TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~580~~ 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 13, 1905.

(19,630.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 530.

SECURITY MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 8, 1905.

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1 Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 15th Day of December, A. D. 1904.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY of Binghamton, N. Y., Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

Be it remembered that heretofore towit, on the 1st day of November 1904 the appellant by his attorney filed in the clerk's office of the court of appeals a transcript of the record in words and figures as follows towit—

2&3 TRANSCRIPT OF RECORD.

STATE OF KENTUCKY,
County of Jefferson.

Pleas Before the Honorable Thos. R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Court House, on the Dates Hereinafter Mentioned.

Jefferson Circuit Court, Second Common Pleas Division.

SECURITY MUTUAL LIFE INSURANCE CO.
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky.

Transcript of Record.

Be it remembered, that heretofore, to-wit, on October 10, 1904, came the plaintiff and filed its verified petition in the office of the clerk of the aforesaid court, which said petition is in words and figures as follows, to-wit:

4 Jefferson Circuit Court.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Defendant. } No. 38371.

Petition in Equity.

The plaintiff Security Mutual Life Insurance Company, says that:

The Security Mutual Life Insurance Company (hereinafter called the Security Mutual) is a corporation created, organized and existing under the laws of the State of New York, with power to carry on the business of life insurance; to contract and be contracted with; to sue and be sued; and has its principal office in the city of Binghamton, New York.

In the year 1900 it became desirous of extending its business into the State of Kentucky and applied by its proper officers to the then insurance commissioner of the State of Kentucky for permission and authority to transact its business within the boundaries of said State, and it complied with all the requirements of the laws of the State of Kentucky applicable to foreign insurance companies doing business in that State. Upon compliance on its part with all the requirements of law for the regulation of foreign insurance companies doing business in the State of Kentucky, the then insurance commissioner of the State of Kentucky granted it
5 permission and authority to transact the business of life insurance in this State. Upon said authority being granted to it, it employed a large number of agents, established a large number of agencies throughout the State, expended large sums of money in establishing said agencies and in advertising its business, and soliciting for life insurance risks; acquired and now has a large, profitable and valuable business in this State; has a large amount of insurance in force in the State of Kentucky, and prior to September 29, 1904, was writing annually a large amount of insurance in this State, the annual premiums upon which amounted to a large amount of money. It has paid all taxes and license fees due to or demanded by the State of Kentucky, or any of its officers or departments, which sums heretofore paid are in part for the unexpired part of the ensuing year. The permission and authority to it to transact business within the State of Kentucky has been renewed and extended from year to year by the insurance commissioner.

The defendant, Henry R. Prewitt, is the insurance commissioner of the State of Kentucky, having been duly appointed and qualified as such on January 4, 1904, and on July 1, 1904, he continued the authority to the Security Mutual to transact the business of life in-

surance in the State of Kentucky, which authority was evidenced by a written certificate, which he signed and delivered to it, and which reads as follows, to-wit:

6 Insurance Department of Kentucky.

Office of the Insurance Commissioner.

FRANKFORT, KY., July 1, 1904.

Whereas, the Security Mutual Life Insurance Company, located in the city of Binghamton, State of New York, is possessed of and has invested and deposited assets as required and is possessed of the requisite legal reserve, and whereas, said company has complied with all the requirements of article IV of an act of the General Assembly of the Commonwealth of Kentucky, which became a law April 5th, 1893.

Now, therefore, I, Henry R. Prewitt, insurance commissioner of the State of Kentucky, in pursuance of the authority vested in me by the laws of this Commonwealth, do hereby authorize the said Security Mutual Life Insurance Company to transact the business of life insurance in this Commonwealth for the period of one year from the date first above written, provided that such authority be not sooner revoked.

In witness whereof, I have hereunto subscribed my name, and caused my official seal to be affixed at the city of Frankfort, on the day and year first above written.

HENRY R. PREWITT,
Insurance Commissioner.

7 On June 17, 1904, G. D. Crain and James Gayle were citizens, and each of them was a citizen of the State of Kentucky, and on that day they filed their petition in the Owen circuit court in the State of Kentucky against the Security Mutual wherein they alleged a breach of contract for personal services and prayed for judgment against the Security Mutual for the sum of $100,000 damages on account of the said alleged breach of contract; the said suit was docketed in the said Owen circuit court under the style of Crain & Gayle *v.* Security Mutual Life Insurance Company.

Thereafter, and within the time limited by law, the Security Mutual filed in said Owen circuit court its petition and bond for the removal of said cause of Crain & Gayle *v.* Security Mutual to the circuit court of the United States for the eastern district of Kentucky; and on September 23, 1904, the Security Mutual perfected the removal of said cause and filed a transcript of the record thereof from the Owen circuit court in the circuit court of the United States for the eastern district of Kentucky. The said removal was without the consent of the plaintiffs Crain & Gayle or either of them.

Sections 35 and 94 of an act of the General Assembly of the State

of Kentucky, entitled "*An act providing for the creation and regulation of private corporations*, which became a law April 5, 1893, provide respectively as follows, to-wit:

Section 35 (which is also known as Ky. Statutes, section 572):

"If any foreign corporation shall, without the consent of the adverse party, *remove to a Federal court* any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, *such action on the part of the corporation shall forfeit its right to transact or carry on any*
8 *business in this State;* and such corporation, and any officer, agent or employé thereof, who shall thereafter transact or engage in any business of employment for such corporation in this State shall be severally guilty of a misdemeanor, and upon indictment, and conviction in the circuit court of any county, in which such corporation, or any officer, agent or employé thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

Section 94 (which is also known as Ky. Stats., section 631):

"Before authority is granted to any foreign insurance company to do business in the State it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; *and if any company shall*, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, *remove said suit or proceeding to any Federal court*, or shall institute any suit or proceeding against any citizen of this State in any Federal court, *it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State*, and to publish such revocation in some newspaper of general circulation published in the State."

On September —, 1904, the said G. D. Crain and James Gayle, or one of them, notified the defendant, Henry R. Prewitt, insurance
9 commissioner of the State of Kentucky, that the Security Mutual had, without their consent, or the consent of either of them, removed said suit of Crain & Gayle *v.* Security Mutual, from the Owen circuit court to the circuit court of the United States for the eastern district of Kentucky, and demanded that the said Prewitt, as insurance commissioner of the State of Kentucky, should forthwith revoke all authority to the Security Mutual and its agents to do business in the State of Kentucky.

On September 29, 1904, the defendant, Henry R. Prewitt, as insurance commissioner of the State of Kentucky, *pursuant to the provisions of the statutes* above quoted, or one of them, and *for the sole reason* that the Security Mutual had *removed* said suit to the circuit court of the United States for the eastern district of Kentucky with-

out the consent of the other parties to said suit *revoked* all authority of the Security Mutual and its agents to do business in the State of Kentucky, and published such revocation in the Louisville Courier-Journal, a newspaper of general circulation, published in the State of Kentucky.

Thereafter the Security Mutual demanded that the defendant, Prewitt, as insurance commissioner of the State of Kentucky, set aside and cancel said revocation of its right to do business in this State, and grant or continue to it and its agents the authority to transact its business in the State of Kentucky, but the said Prewitt, as insurance commissioner of the State of Kentucky, *for the sole reason* that the Security Mutual had, without the consent of said Crain and Gayle, or either of them, *removed* said suit from the Owen circuit court to the circuit court of the United States for the eastern district of Kentucky, *refused and still refuses* to set aside or cancel said revocation, or to grant or continue to the Security Mutual and its agents the authority to do business in the State of Kentucky.

10 The Security Mutual specially sets up and claims:

(1.) That under the Constitution of the United States and the laws of the United States which have been made in pursuance thereof, the Security Mutual was entitled to remove the said suit of Crain & Gayle *v.* Security Mutual from the Owen circuit court unto the circuit court of the United States for the eastern district of Kentucky.

(2.) That the purpose of sections 35 and 94 of an act of the General Assembly of the State of Kentucky, entitled "An act providing for the creation and regulation of private corporations," which became a law April 5, 1893, and each of them is to deprive foreign corporations, and especially foreign insurance corporations of the right conferred upon them by the Constitution and laws of the United States to remove suits from the State courts into the circuit courts of the United States for the district of Kentucky in those cases provided for by said Constitution and laws of the United States.

(3.) That the said sections of the aforesaid act of the General Assembly of the State of Kentucky make the right of the Security Mutual to a continuance of the authority to transact its business in the State of Kentucky dependent upon its surrender of a privilege and right secured to it by the Constitution of the United States and the laws of the United States which have been made in pursuance thereof.

(4.) That the said sections 35 and 94 are and each of them is contrary to the Constitution of the United States and the laws of the United States, and are null, void and unconstitutional thereunder.

Unless plaintiff, Security Mutual, shall receive from the defendant, Henry R. Prewitt, as insurance commissioner of the State of Kentucky, a continuance of its authority and be permitted to

11 transact its business in the State of Kentucky, it will lose its agents, who will no longer continue to transact its business

for it; its business will be demoralized and lost; it will be put to a great deal of expense, many of its present policies will be lapsed; large amounts of money heretofore expended in the creation and establishment of its agencies and building up its business and in advertising the same will be rendered useless and lost and from which no adequate return can be had and it will suffer great and irreparable injury and damage and for which it has no adequate remedy at law.

Wherefore, the plaintiff, Security Mutual Life Insurance Company, prays as follows, to-wit:

First. That the defendant, Henry R. Prewitt, insurance commissioner of the State of Kentucky, be required and directed—

(*a.*) To cancel and annul the revocation of the authority of the plaintiff and its agents to do business in this State.

(*b.*) To grant or continue the authority to the plaintiff and its agents to transact business of life insurance in the State of Kentucky.

Second. That an order be entered by this court directing and requiring said Prewitt to restore to the plaintiff its license to do business in this State and to publish in the Louisville Courier-Journal, or some other newspaper of general circulation in this State, notice of the cancellation of said revocation and the restoration to the plaintiff and its agents of the authority to do business in this State.

Third. That the defendant, Henry R. Prewitt be restrained and enjoined from notifying the general agents of the plaintiff of the suspension of its license and of its right to do business in this State, and that he shall be further enjoined and restrained from ap-
12 plying to the judge of the Franklin circuit court, or any other circuit court to issue an injunction restraining the plaintiff in whole or in part from further proceeding with its business.

Fourth. That sections 35 and 94 of an act of the General Assembly of the State of Kentucky, entitled "An act providing for the creation and regulation of private corporations," which became a law April 5, 1893, be adjudged to be unconstitutional, null and void as violative of the Constitution of the United States and the laws of the United States made in pursuance thereof and that the action of the defendant as insurance commissioner of the State of Kentucky thereunder be vacated, set aside and held for naught.

Fifth. For its costs and all general relief.

F. W. JENKINS,
WM. MARSHALL BULLITT,
Attorneys for Plaintiff.

F. W. Jenkins, being duly sworn says that he is the third vice-president of the plaintiff, Security Mutual; that he is the chief officer or agent of the company in this State; that he has read the foregoing petition and that the statements therein contained are true.

F. W. JENKINS.

Subscribed and sworn to before me by F. W. Jenkins this 10th day of October, 1904. My commission expires February 26, 1906.

J. M. WALLACE,
Notary Public in and for State of Kentucky,
County of Jefferson.

At a court held October 29, 1904:

It appearing that on October 11, 1904, the defendant, Henry R. Prewitt, filed herein his demurrer to the petition and also a motion to strike out from the petition, and that said demurrer and
13 motion were marked "Filed" by the clerk, and were argued orally before the court and briefed, and the cause submitted, but no order was entered upon the order book.

It is now ordered, by consent, that said demurrer and motion be, and the same hereby are filed and the cause submitted *nunc pro tunc* as of October 11, 1904.

Said demurrer and motion are in words and figures as follows, to-wit:

Jefferson Circuit Court, Chancery Branch Division.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
HENRY R. PREWITT, Defendant. } No. 38371. Demurrer.

The defendant demurs to the petition herein because it does not state facts sufficient to constitute a cause of action against him.

H. R. PREWITT, Com'r.

14 Jefferson Circuit Court, Chancery Branch Division.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
HENRY R. PREWITT, Insurance Commissioner of Kentucky, Defendant. } No. 38371. Motion.

Comes the defendant, H. R. Prewitt, commissioner, and moves the court to strike out of the petition herein the following words, to-wit:

"On September 29, 1904, the defendant, Henry R. Prewitt, as insurance commissioner of the State of Kentucky, pursuant to the provisions of the statutes above quoted, or one of them, and for the sole reason that the Security Mutual had removed said suit to the circuit court of the United States for the eastern district of Kentucky, without the consent of the other parties to said suit, revoked all au-

thority of the Security Mutual and its agents to do business in the State of Kentucky, and publish such revocation in the Louisville Courier-Journal, a newspaper of general circulation in the State of Kentucky."

Also,

"(2.) That the purpose of sections 35 and 94 of an act of the General Assembly of the State of Kentucky, entitled 'An act providing for the creation and regulation of private corporations,' which became a law April 5, 1893, and each of them, is to deprive
15 foreign corporations, and especially foreign insurance corporations, of the right conferred upon them by the Constitution and laws of the United States to remove suits from the State courts into the circuit courts of the United States for the district of Kentucky in those cases provided for by said Constitution and laws of the United States."

H. R. PREWITT, Com'r.

At a court held October 29, 1904:

This cause having been submitted upon the defendant's demurrer and motion to strike from the petition, and the court being advised delivered an opinion, which is filed herewith and made a part of the record.

It is thereupon ordered that said motion and demurrer be, and the same hereby are each overruled, to which the defendant objected and excepted.

The said opinion is in words and figures as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
HENRY R. PREWITT, Insurance Commissioner, Defendant.
} No. 38371. Opinion.

The plaintiff is a foreign insurance company and has complied with the legal requirements, and has been granted license to do business in the State of Kentucky.

Without the consent of the plaintiff, in a certain suit pend-
16 ing against it in the Owen circuit court, it filed its petition therein, executed bond and caused a removal of said cause to the circuit court of the United States for the eastern district of Kentucky.

On September 29, 1904, after such removal, the defendant, Henry R. Prewitt, as insurance commissioner, pursuant to sections 572 and 631, Kentucky Statutes, or one of them, and "for the sole reason that the Security Mutual Insurance Co. had removed said suit to the circuit court of the United States," revoked the authority of

defendant to do business and published such revocation as required by section 631 of the statutes, and upon the demand of defendant for a cancellation of said revocation the commissioner "for the sole reason" that the insurance company had removed said action refused and still refuses to allow or grant to the insurance company the right to do business in Kentucky. To require the commissioner to cancel his order revoking plaintiff's authority to do business, and to require him to grant to plaintiff the right to continue its business in this State, this action is brought; a demurrer being interposed to the petition, the above facts are admitted, and the rights of the parties depend upon the validity of the two sections of the statutes, which are as follows:

"SEC. 572. If any foreign corporation shall, without the consent of the adversed party, remove to a Federal court any action pending against it in any court of this State, in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employee thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor,
17 and, upon indictment and conviction in the circuit court of any county in which such corporation or any officer, agent or employee thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

"SEC. 631. Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

I shall not discuss the validity of section 572, because in the case of Commonwealth *v.* East Tennessee Coal Co., 97 Ky., 239, it was expressly held unconstitutional and void.

The real question to be decided in this case is: Has the State the power, by statute, to authorize or require the insurance commissioner to revoke the license of a foreign insurance company because such company removes a case from the State to the Federal court without consent of the opposing litigant?

It is settled law, and is not disputed in this case, that the right of removal from the State to the Federal court, in a case
18 such as was removed from the Owen circuit court, is a right under the Constitution and laws of the United States, that may not be denied, limited, or abridged by the States; that any State statute which seeks to restrict such right is in conflict with the Federal Constitution and is void. It is further beyond controversy that a foreign corporation such as defendant, has no right to do business in this State, except by permission of the State, either express or implied, and that the States in granting such rights may place any conditions or limitations thereon which to it seem proper, which "are not repugnant to the Constitution or laws of United States." (La Fayette Ins. Co. *v.* French, 18 How., 404.)

In the case of Insurance Company *v.* Morse, 20 Wall., 445, the court held that an agreement under a State statute requiring a foreign insurance company, as a condition of being granted license to do business in the State, to agree that it would not remove an action from the State to a Federal court, was void, because it was an obstruction to the right of removal under the Federal Constitution and laws. Chief Justice *Waite* and Mr. Justice *Davis* dissented.

In the case of Doyle *v.* Continental Ins. Co., 94 U. S., 535, the court seems to decide that a State has a right to exclude a foreign insurance company, or fix such conditions upon its transaction of business within a State as it sees fit, and having granted a permit to such company, may revoke it, and the means by which she causes such exclusion or the motives of her action may not be the subject of judicial inquiry. This decision seems to decide the exact question involved in the case at bar, in favor of the constitutionality of the section of the statute under inquiry here. Justices *Bradley*, *Swayne* and *Miller* dissented in this case.

In the subsequent case of Barron *v.* Burnside, 121 U. S., 186, the court had under consideration an Iowa statute very similar
19 to our statute, which required that certain foreign corporations, as a condition of obtaining a permit for the transaction of business in that State, should stipulate not to remove suits to the Federal court. The court held such statutes unconstitutional, because its purpose was to deprive such corporations of the constitutional right to remove suits. Referring to Doyle *v.* Insurance Co., *supra*, the court says:

"The point of decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

The court further says:

"In all the cases in which the court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that

no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States."

I think the case of Barron *v.* Burnside (in which there was no dissent) practically overrules Doyle *v.* Insurance Co., though it does not do so in terms. But the court of appeals of Kentucky, in Commonwealth *v.* East Tennessee Coal Co., says that it "disposes of Doyle *v.* Insurance Co.," so I am of opinion that it is not authority upon the question here involved.

The general doctrine that the restriction upon removal cannot be upheld, is supported by Southern Pacific Co. *v.* Denton, 146 U. S., 20; Martin *v.* Balt. & Ohio R. R. Co., 151 U. S., 684; Barrow
20 Steamship Co. *v.* Kane, 170 U. S., 100; Blake *v.* McClung, 172 U. S., 255.

The question involved here has been elaborately discussed, the cases reviewed, and I think the question decided, by the Kentucky court of appeals in Commonwealth of Kentucky *v.* East Tennessee Coal Co., 97 Ky., 238. In that case the constitutionality of section 572 of the Kentucky Statutes, above quoted, was the subject of inquiry. The court, after a review of the cases, says:

"From this review of the decisions of the Supreme Court of the United States, it would seem that there is no longer any question as to the invalidity of legislation such as this act we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege even under the power of the State to fix the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void."

With that decision, the right of every foreign corporation, except insurance companies, to transfer its cases from the State to the Federal court, without forfeiting its right to do business in this State, is recognized and established. Such legislation as is here condemned as being unconstitutional, as it effects all other foreign corporations, I can conceive of no good reason for holding constitutional as to insurance companies.

It may be observed that provision is made by other sec-
21 tions of the chapter on insurance, Kentucky Statutes, for the admission of foreign insurance companies, and for withdrawing their right to do business, in certain cases. It is alleged that the plaintiff has complied with all the requirements of the statute, and if the revocation of its license solely because it removed a case to the Federal court was without warrant of law, it has the right to do business in this State. Following the views of the court of appeals of Kentucky above quoted, and upon the authorities above cited, I am of opinion that section 631, Kentucky Statutes, so far as it authorizes a revocation of the authority of a foreign insurance

company to do business in the State, is unconstitutional, and did not therefore authorize the action of the commissioner in revoking plaintiff's license or authority.

The demurrer to the petition is overruled, and unless defendant desires to plead, the relief sought in the petition will be granted.

THOS. R. GORDON, Judge.

F. W. Jenkins & Wm. Marshall Bullitt, for plaintiff.
Attorney General Hays & James H. Hazelrigg, for defendant.

At a court held October 29, 1904:

The defendant, Henry R. Prewitt, insurance commissioner of the State of Kentucky, declined to plead further, and the court being advised,

It is now ordered, adjudged and decreed as follows, to-wit:

1. That the defendant, Henry R. Prewitt, insurance com-
22 missioner of the State of Kentucky, be and he hereby is ordered and directed:

(a) To cancel and annul the revocation of the authority of the plaintiff and its agents to do business in the State of Kentucky.

(b) To grant authority to the plaintiff and its agents to transact business of life insurance in the State of Kentucky.

(c) To restore to the plaintiff its license to do business in this State.

2. That the defendant, Henry R. Prewitt, as insurance commissioner of the State of Kentucky be and he hereby is restrained and enjoined from notifying the general agents of the plaintiff of the suspension of its license and its right to do business in this State and he is further enjoined and restrained from applying to the judge of the Franklin circuit court or any other circuit court for an injunction restraining the plaintiff in whole or in part from further proceeding with its business.

3. That the plaintiff recover of the defendant its costs herein expended and for the same may have execution, to all of which the defendant, Henry R. Prewitt, insurance commissioner of the State of Kentucky, objected and excepted, and prayed an appeal to the court of appeals, which is granted.

23 STATE OF KENTUCKY, }
County of Jefferson. }

I, W. L. Weller, Jr., clerk of the Jefferson circuit court in and for the county and State aforesaid, do hereby certify that the foregoing transcript contains a true and complete copy of the record according to the truth in the case wherein The Security Mutual Life Insurance Company is plaintiff and Henry R. Prewitt, insurance commissioner of the State of Kentucky, is defendant, a cause lately pending in the aforesaid court, common pleas branch, second division, No. 38371, as the same appears of record and now on file in my office.

Witness my hand this 31st day of October, 1904.

W. L. WELLER, JR.,
Clerk Jefferson Circuit Court.

24 With the foregoing transcript, the appellant filed a statement in the office of the clerk of the court of appeals in words and figures as follows towit:—

In the Court of Appeals of the State of Kentucky.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
versus
SECURITY MUTUAL LIFE INSURANCE COMPANY OF BINGHAMTON, N. Y., Appellee.

Appeal from the Jefferson Circuit Court, Common Pleas Branch, Second Division.

The judgment appealed from was rendered on the 28th October 1904 and may be found on pages 21 and 22 of the record. No summons is to issue.

N. B. HAYS,
Attorney General of Ky.
J. H. HAZELRIGG,
Counsel for Appellant.

F. W. JENKINS,
WM. MARSHALL BULLITT,
Counsel for Appellee.

25 Be it remembered that on the 2nd day of November 1904 in the court of appeals at the capitol at Frankfort, the following order was entered towit:—

PREWITT, Commissioner,
vs.
SECURITY MUT. INS. CO., JEFFERSON.

Came parties by counsel and on motion said cases are ordered docketed and advanced, and same coming on for hearing were argued by W. M. Bullit for*ma* appellee Security Mutual Insurance Co., and by J. H. Hazelrigg for H. R. Prewitt insurance commissioner, and submitted.

And afterwards on the 15th day of December 1904 at a court of appeals the following judgment was entered towit:—

HENRY R. PREWITT, Insurance Commissioner, Appellant,
vs.
SECURITY MUTUAL INSURANCE COMPANY, Appellee.

Appeal from Jefferson Circuit Court, Ch'y B, 2nd D.

The court being sufficiently advised it seems to them the judgment herein is erroneous,

It is therefore considered that said judgment be reversed and cause remanded to lower court, with instructions to dismiss petition, which is ordered certified to said court (whole court sitting, Chief Justice Burnam, and Judge Barker dissenting.)

It is further considered that the appellant recover of appellee his cost herein expended.

On said day the following opinion was delivered in said case towit:

26 DECEMBER 15TH, 1904.

Court of Appeals of Kentucky.

(To be Reported.)

HENRY R. PREWITT, Commissioner, Appellant,
vs.
SECURITY LIFE INS. CO., Appellee.
} Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

THE TRAVELERS INS. CO., Appellant,
vs.
HENRY R. PREWITT, Commissioner, Appellee.
} Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

Opinion of the Court by Judge Hobson.

In the first of the above cases the Security Mutual Life Insurance Company filed its petition in equity alleging that in the year 1900 it began business in Kentucky having complied with the requirements of the statutes of the State applicable to foreign insurance companies, the plaintiff being a corporation organized under the laws of the State of New York; that the commissioner then granted it permission to transact the business of life insurance in this
27 State, and it employed a large number of agents, established a large number of agencies throughout the State, expended large sums of money in advertising its business and acquired a large and profitable business in the State; that in June, 1904, it removed to the circuit court of the United States for the eastern district of Ken-

tucky without the consent of the other party a suit brought against it in one of the circuit courts of the State, and that on September 29, 1904, the defendant Prewitt, as insurance commissioner, revoked its authority to do business in the State for the sole reason that it had removed the suit referred to to the circuit court of the United States and refused, and still refuses, to set aside the revocation. It prayed an injunction requiring the commissioner to annul the revocation of its license and to continue its authority to transact the business of life insurance in the State. The defendant demurred, to the petition, his demurrer was overruled, and he declining to plead further, a judgment was entered as prayed in the petition.

28 In the other case the petition is very similar, except that it is there averred that the commissioner has not yet revoked the plaintiff's license, but that he threatens to do so, and unless enjoined by the court will revoke it, to the plaintiff's irreparable injury, it being a foreign corporation created under the laws of the State of Connecticut. The defendant demurred to the petition; his demurrer was sustained, and the plaintiff declining to plead further, its petition was dismissed. Both the appeals raise the same questions, and will be considered together.

By section 635, Ky. Stat., licenses to agents of foreign companies must be renewed annually, and any person acting as the agent of such a company without procuring a license, or after the license has expired, or has been suspended or revoked, shall be guilty of a misdemeanor, and fined not less than $50.00 or more than $100.00 for each offense. By section 634 every foreign insurance company before transacting any business in this State must return to the commissioner a copy of its charter or organic law, and the commissioner upon being satisfied that the company has complied with

29 the laws of the State and is possessed with the legal reserve, shall furnish to such agents as the company directs a license to transact business as agents for the company, under the seal of the insurance department. By section 657, foreign life insurance companies in addition must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, &c. By section 694, insurance companies other than life not incorporated under the laws of this State, upon complying with the provisions of the statute, may be authorized by the commissioner to transact business in the State. By section 761 the fees to be charged by the commissioner are regulated. Section 631, Ky. Stat., is in these words:

"Before authority is granted to any foreign insurance company to do business in this State, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said

30 company; and if process is served upon the commissioner, it shall be his duty to at once send it by mail, addressed to the

company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State; and to publish such revocation in some newspaper of general circulation published in the State."

The validity of the latter clause of the section is the only question to be determined upon the appeal. It is insisted that it is in conflict with the Constitution of the United States. Three decisions of the United States Supreme Court are relied on. In Home Insurance Company *v.* Morse, 20 Wall., 445, the statute of the State required the foreign insurance company to sign an agreement not to remove any of its cases to the Federal courts. The company signed the agreement and afterwards filed a petition seeking the removal of a suit brought against it to the Federal court. The State
31 court refused to remove the case, but on appeal to the United States Supreme Court the judgment of the State court was reversed and it was held that the agreement in advance not to exercise a right guaranteed by the Constitution did not prevent the defendant from removing the case to the Federal court. The opinion was written by Judge Hunt, and goes no further than the question actually before the court.

The next case relied on is Doyle *v.* Continental Insurance Company, 4 Otto, 535, the opinion being also written by Judge Hunt. In that case there was a State statute corresponding to section 631 above quoted, and the State officer under it was about to cancel the license of the insurance company. The plaintiff made in substance the same allegations as are made in the cases before us, and prayed an injunction as in these cases. The Supreme Court reversing the court below, dismissed the bill. After distinguishing the case from the Morse case, the court said:

"The cases of Bank *v.* Earle (13 Pet., 519), Ducat *v.* Chicago
32 (10 Wall., 410), Paul *v.* Va. (8 Wall., 168), and Insurance Company *v.* French (18 How., 404), establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Chief Justice Taney in the case first named, and by Mr. Justice Field (Curtis) in the case last named.

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. (Rector *v.* Philadelphia, 24 How., 300; People *v.* Roper, 35 N. Y., 629; People *v.* Commissioners, 47 N. Y., 501.) The power to revoke can only be restrained, if at all, by an explicit con-

tract upon good consideration to that effect. (Humphrey *v.* Pegues, 16 Wall., 244; Tomlinson *v.* Jessup, 15 Wall., 454.)

"License to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens and its business belongs to the State.

"If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into.

33 Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself, or as to the reason for it. The State of Wisconsin (except so far as its connection with the Constitution and laws of the United States alters its position) is a sovereign State, possessing all the powers of the most absolute government in the world.

"The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

"In all cases where the litigation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal."

34 After discussing certain previous decisions, the court added:

"It is said that we thus indirectly sanction what we condemn when presented directly, to-wit: That we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that State: that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

It is conceded by counsel that if this case is still authority, these actions must fail. But it is insisted that in Barron *v.* Burnside, 121 U. S., 186, this case was, in effect, overruled. In
35 Barron *v.* Burnside, there was a State statute requiring every foreign corporation to have a license before engaging in business in the State. The license, by the terms of the statute, was not to be issued, except upon the application of the company by a resolution of the board of directors or stock holders authorizing it, and containing a stipulation that the permit should be subject to each of the provisions of the act, one of which was that the permit should be void if the corporation removed a case to the Federal courts. Barron was arrested under the statute for doing business for a foreign corporation without complying with the statute, and obtained a writ of *habeas corpus*, which was sustained by the United States Supreme Court. The court, after quoting the statute, and discussing it at some length, said:

"This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit; and this request or application is to contain the stipulation above mentioned. These various things are not separable."
36 Then after some further discussion of the statute, the court concludes with these words:

"In view of these considerations, the case falls directly within the decision of this court in Home Insurance Company *v.* Morse."

It then proceeds, after showing what was decided in the Morse case, to discuss the Doyle case in these words:

"The case of Doyle *v.* Continental Insurance Company, 94 U. S., 535, is relied on by the defendant in error. In that case this court said that it had carefully reviewed its decision in Home Insurance Company *v.* Morse, and was satisfied with it. In referring to the second conclusion in Insurance Company *v.* Morse, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in Doyle *v.* Continental Insurance Company, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license to do business
37 in the State. Afterwards, it removed into the Federal court a suit brought against it in a State court of Wisconsin. The State authorities threatening to revoke the license, the company filed a bill in the circuit court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the

decree, and dismissed the bill. The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Company *v.* Morse (*supra*), must be regarded as not in judgment."

We do not understand this to overrule the Doyle case, for certainly if the State cannot withdraw the license it has once granted, any court of competent jurisdiction may so decide. If the State statute withdrawing the license was unconstitutional and void, the Supreme Court of the United States had the same power to declare the
38 statute in that case unconstitutional as it had to declare the statute unconstitutional in Barron *v.* Burnside.

Our statute is not liable to the objections made to the statute in either the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State for the protection of its citizens against unsafe insurance companies should require them before doing business in the State to obtain a license from the insurance commissioner, and to furnish him such evidences of their solvency as will protect insurers in this State, before he is authorized to grant them a license. The license which the State grants is purely a matter of grace, and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it he takes it subject to revocation. He
39 cannot question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State, with or without reason. If I have license to cross my neighbor's lot and he revokes it because I brought a suit against his son, I cannot enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for his revoking the license he had given me; for he had an absolute right to revoke the license and the fact that he did it out of spite or for a bad reason is immaterial. The State, by her statutes above referred to, in effect, says to the foreign insurance companies, "I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come, you refuse to so stand, I will withdraw my license." The reason for the statute is not distrust of the
40 Federal courts, but the practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the parties and witnesses reside. Domestic insurance companies enjoy no such immunity, but

must try their cases in the vicinage; the State simply says to the foreign insurance companies, "I will withdraw my license if you insist on privileges not enjoyed by home companies." If the State on the day before these suits were filed by legislative act had withdrawn all licenses to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States circuit court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by a special statute? Certainly they cannot complain that the license of certain other companies was not revoked.

The case of Commonwealth *v.* East Tennessee Coal Com-
41 pany, 97 Ky., 238, did not involve the revocation of a license granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State courts. The naked question presented here is, may the State, without cause, revoke a license it has once granted; for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound; unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in the State (Hooper *v.* California, 155 U. S., 650), and yet that it may not at will withdraw a license which it has once granted to such corporations.

It seems to us that the *B*oyle case rests on sound principles, and that the Barron case in no wise conflicts with it; for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the
42 Morse case. (6 Thompson on Corporations, sections 7466–67; 13 Am. & Eng. Ency. of Law, page 867; People *v.* Pavey, 151 Ill., 101.)

The judgment in the first case is therefore reversed and cause remanded to lower court with instructions to dismiss the petition. The judgment in the second case is affirmed.

Whole court sitting.

Chief Justice Burnam & Judge Barker dissenting.

N. B. Hays, att'y gen'l, J. H. Hazelrigg, for Ins. Com'r.

Wm. Marshall Bullitt, F. W. Jenkins, for Security Mut. Life Ins. Co.

Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Insurance Company.

[Stamped:] W. G. Baxter, official copyist court of appeals, Kentucky.

43 And afterwards on the 19th day of January, 1905, at a court of appeals at the capitol at Frankfort, the following order was entered towit:

PREWITT, Commissioner,
vs.
SECURITY MUTUAL INS. CO. } Jefferson.

Judge Barker delivered a dissenting opinion herein. The dissenting opinion being in words and figures as follows :—

44 Court of Appeals of Kentucky, January 19th, 1905.

HENRY R. PREWITT, Commissioner, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee. } Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

THE TRAVELERS INSURANCE COMPANY, Appellant,
vs.
HENRY R. PREWITT, Commissioner, Appellee. } Appeal from Jefferson Circuit Court (Ch'y (2nd) Div.).

Dissenting Opinion by Judge Barker.

Believing that the conclusion reached by the majority of the court in these cases cannot be justified either by reason or upon authority, I feel it my duty to present my views in a dissenting opinion. I do this with great modesty, and with great reluctance: the first from solicitude lest I fail to do justice to the importance of the subject, and the second from my disinclination to differ from the opinions of those whose attainments I hold in so high esteem.

The question presented by these records is whether a State may enact a valid law, which shall present to a foreign corporation the alternative either of surrendering its right, under the pro-
45 visions of the Constitution and laws of the United States, to remove to the Federal court an action instituted against it by a citizen in the State court, or of not being permitted to do business in the State. The proper solution of this question is essential to the orderly adjustment of the conflicting spheres of our dual system of jurisprudence—national and State.

When our complex form of government was established, the National Constitution, and the laws enacted in pursuance thereto, were made the supreme law of the land (U. S. Constitution, art. 6); and it must necessarily follow, as a logical and legal sequence, that, whenever a State law comes in conflict with a national law, the former must give way—it is void. The statutes of the United States, in pursuance of a settled national policy of affording to citizens of each State the means of escaping the dangers of local prejudice in favor of home litigants, prescribe the conditions and terms under which such actions may be removed to the Federal courts. This is

done in the interest of fair and impartial trials, or, in other words, in the interest of justice.

The laws of our Commonwealth bearing upon the question under investigation are divided into two branches, although the intent of each is the same; the divergence being merely in the particular manner of enforcing the same principle against different classes of corporations. Sections 572 and 573 of the Kentucky Statutes apply to all foreign corporations doing business in the State, except insurance companies, and are as follows:

46 SECTION 572. "If any foreign corporation shall, without the consent of the adverse party, remove to the Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employé thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and, upon indictment and conviction in the circuit court of any county in which such corporation, or any officer, agent or employé thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

SECTION 573. "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corpora-

47 tion shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The statute applicable to foreign insurance corporations is to be found in sections 631 and 633 of the Kentucky Statutes, and is as follows:

SECTION 631. "Before authority is granted to any foreign insurance company to do business in this State, it must file with the com-

missioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the commissioner of insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

SECTION 633. "Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the commissioner that the company represented by the agent has fully complied with the law, and maintains its required capital or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance to or from such company, or advertises that he will receive or transmit the same, or who shall, in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the commissioner to act as such agent, or, after such license has expired, been suspended or revoked, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held guilty of a misdemeanor, and, upon conviction for such offense, shall be fined not less than fifty nor more than one hundred dollars for each offense."

The question involved here was presented for adjudication in this State for the first time in Commonwealth *v.* East Tennessee Coal Co., 97 Ky., 238, and Commonwealth *v.* Jellico Coal Co., *id.*, 246. These cases arose under section 572 of the Kentucky Statutes, the two corporations, as their names import, being coal companies. The opinions in both were delivered by the court through Judge Eastin, and contain a learned and thorough discussion of the question at bar. In both, section 572, which, as said before, applies to foreign corporations (except insurance) doing business in the State, was held to be void, because in contravention of the Constitution and laws of the United States. These cases are both practically overruled by the opinion of the majority, although this has not been done in express language; the court, as it seems to me, unsuccessfully seeking to distinguish them from the cases at bar, and, in

so doing, inadvertently, of course, misstating the question involved in them. The following is the language of the opinion with reference to the case containing the reasoning on the constitutional question:

"The case of Commonwealth *v.* East Tennessee Coal Co., 97 Ky., 238, did not involve the revocation of a license granted by the State, but was in effect similar to Barron *v.* Burnside, above cited, being a proceeding to impose a fine on the defendant after it removed a case from the State court."

Judge Eastin commences his opinion with the following language: "This appeal involves the constitutionality of section 572 of the Kentucky Statutes, which is in these words, to-wit: * * *." Then, after citing section 572, he said:

"Under this provision of the statutes, this action was brought by appellant in the Whitley circuit court for the purpose of having it judicially declared that appellee had forfeited its right to carry on business in Kentucky, and of enjoining it from doing so. In the petition, it is alleged that appellee is a foreign corporation, created by the laws of the State of Tennessee, but engaged for several years past in carrying on business in Whitley county in this State, and that on May 14, 1894, it had, by proper proceedings, procured the removal from the Whitley circuit court, of an action therein
50 pending against it, to the Federal court sitting at Frankfort, Ky., on the alleged ground that said suit involved a controversy between citizens of different States, and that this was done without the consent of the adverse party to said action. It is further alleged that, by this action, appellee has forfeited its right to carry on business in this State, but that, notwithstanding this fact, it is still engaged in carrying on its business in Whitley county, Kentucky, and the court below is asked to decree the existence of the alleged forfeiture and to enjoin appellee from further continuing its said business in Kentucky."

So that the court are mistaken in supposing that the case explained simply involved the imposition of a fine. It was nothing more or less than a proceeding to revoke the license or right to do business in Kentucky of a foreign corporation, for the sole reason that it had exercised its privilege of removing an action, instituted against it by a citizen of this State, to the Federal court. In principle the questions involved there and here are identical. With this question before it, the court there held that section 572 was unconstitutional, after a review of all the Federal decisions on the subject. The opinion concludes in these words:

"From this review of the decisions of the Supreme Court of the United States, it would seem that there is no longer any ques-
51 tion as to the invalidity of legislation such as this act we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would

clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege even under the power of the State to fix the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void.

"In accordance with these views we adjudge that section 572 of the Kentucky Statutes is unconstitutional, and that the demurrer of appellee to the petition filed against it by appellant was properly sustained."

The case of Commonwealth *v.* Jellico Coal Company did involve the right to fine a foreign corporation for removing an action instituted against it by a citizen of the State to the Federal court, and the right to impose this fine was denied upon a simple question of procedure under the statute; however, the court did not rest here, but, after deciding the case adversely to the Commonwealth on the first ground, said:

"* * * but, in addition to this, and for the reasons fully
52 set forth in the opinion this day delivered in the case of Commonwealth *v.* East Tennessee Coal Co., *ante*, p. 246, with which this appeal was heard, it is the opinion of this court that the section of the statute above referred to is in conflict with the Constitution and laws of the United States, and therefore void."

So that it is plain that this court, as then constituted, were of opinion that section 572 was unconstitutional, and, under its provisions, neither a fine could be imposed for a violation of its terms, nor the right to do business by a foreign corporation prevented in a direct proceeding had for that purpose.

These cases, and especially the first one, so far as the principle involved is concerned, are identical with that in the cases at bar. Of course, I recognize the inutility of pointing out a conflict between older and later opinions of the same court on the same question; the last is always the law, but I deeply regret that an opinion showing such painstaking labor and learning, as does that in Commonwealth *v.* East Tennessee Coal Company, should receive no better fate at the hands of the court, as at present constituted, than to be silently ignored, or, worse still, should only have been thought worthy of a casual line, which wholly misstates the question involved.

But there are cases which cannot be so lightly thrust aside, being the utterances of the Supreme Court of the United States, which is the final expositor of all questions arising under the Consti-
53 tution and the laws of the United States.

The question in hand, so far as I am advised, was adjudicated by the Supreme Court of the United States for the first time in Insurance Co. *v.* Morse, 87 U. S. (20 Wall.), 445. This case went up from the State of Wisconsin under a statute, the pertinent part of which is as follows:

"It shall not be lawful for any fire inurance company, associa tion, or part nership, incorporated by orrganized under the laws of

any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

The question arose in this way: The Home Insurance Company of New York having been sued in Wisconsin by a citizen
54 of that State, undertook to remove the action under the Federal statute to the Federal court. This was resisted because the company had agreed, in compliance with the statute above quoted, not to remove such actions to the Federal courts, and this fact being established, the State court refused to permit the removal, and entered judgment on final hearing against the company. The Supreme Court of the United States, on writ of error, reversed the supreme court of Wisconsin, and returned the case with directions to grant the removal in accordance with the prayer of the petition. This was done on two grounds: First, that the agreement was void at common law, and, second, it was void because it was in contravention of the National Constitution, and statutes passed pursuant thereto, permitting the removal in question. The court said (page 458):

"We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

"On this branch of the case the conclusion is this:

"1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

"2nd. The statute of Wisconsin is an obstruction to this
55 right, and is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3rd. The agreement of the insurance company derived no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

The case of Doyle *v.* Continental Insurance Company afterwards went up from the supreme court of Wisconsin to the Supreme Court of the United States on a different phase of the same statute. In that case, the insurance company removed the cause, and the State authorities undertook to revoke the license to do business in the State for this violation of the statute. The company instituted

a suit in equity for an injunction restraining the secretary of state from this alleged wrongful act A temporary restraining order was entered, and upon final hearing, was made perpetual. On appeal, the Supreme Court held that the foreign insurance company was without remedy under the circumstances, and that the State could revoke the license even under an unconstitutional law. There can be no doubt that the opinion in this case fully sustains that of the majority in the case at bar, and, if it still expresses the law, my brethren are correct in the conclusion they have reached in the cases under consideration. But, afterwards, the case of Barron v. Burnside, 121 U. S., 186, came on for adjudication, and involved a still different phase of a similar statute. This case arose in Iowa,
under a statute not differing in principle from any of the
56 statutes hereinbefore stated or discussed. The law denounced a fine against any foreign corporation doing business in Iowa without a permit or license; sections 3 and 4 being as follows:

"SEC. 3. Any foreign corporation sued or impleaded in any of the courts of this State upon any contract made or executed in this State or to be performed in this State or for any act or omission, public or private, arising, originating, or happening in the State, who shall remove any such cause from such State court into any of the Federal courts held or sitting in this State, for the cause that such corporation is a non-resident of this State or a resident of another State than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner."

"SEC. 4. Any foreign corporation that shall carry on its business
and transact the same on and after September 1, 1886, in the
57 State of Iowa by its officers, agents, or otherwise, without having complied with this statute, and taken out, and having a valid permit shall forfeit and pay to the State for each and every day in which such business is transacted and carried on the sum of one hundred dollars ($100), to be recovered by suit in any court having jurisdiction. And any agent, officer or employé who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offense shall be fined, not to exceed one hundred dollars ($100), or imprisoned in the county jail, not to exceed thirty days, and pay all costs of prosecution."

The Chicago and Northwestern Railroad Company was an Illinois corporation doing business in Iowa without the permit or license required by the statute. One of its engineers was arrested and fined

for carrying on the business of the corporation when it had no permit to do business in the State. When this case came to the Supreme Court, both of its former adjudications on this subject were reviewed, and the conclusion reached that the whole statute was void, because of the unconstitutionality of that part which undertook to prohibit foreign corporations from removing causes against them to the Federal court.

On the subject of Doyle *v.* Continental Insurance Company, after thoroughly discussing it, the court said (page 199):

58 "The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. *v.* Morse, must be regarded as not in judgment."

I differ from the majority in construing this language of the opinion. It seems to me that it was meant to overrule the opinion then under review. Any other conclusion would make the opinion in the case then at bar meaningless. There is no doubt but that the Iowa statute applied to the foreign insurance company involved in the litigation. Mr. Justice Blatchford opens his opinion with the following sentence: "The statute manifestly applies to the Northwestern Railway Company as an Illinois corporation;" so that, if the statute was valid, the proceeding against the offending engineer was also valid, as there was no question in the opinion as to the commission of the acts which contravened the statute. The court concludes its review of the two cases in the following language:

"In both of these cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the State court. In the present case,

58½ no such agreement has been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State courts, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits.

"As the Iowa statute made the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The inherent infirmity of the majority opinion lies in the effect it gives to an unconstitutional statute. The Supreme Court, in the

case of Norton *v.* Shelby County, 118 U.S. Rep., 442, on this subject says: "An unconstitutional act is not a law; it confers no right; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never
59 been passed." In Cooley's Constitutional Limitations (page 188), it is said:

"When a statute is adjudged to be unconstitutional, it is as if it has never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

If this be the law, then so much of the statute under consideration as is admitted to be unconstitutional is as if it had never been enacted by the legislature; where, then, is the warrant of the insurance commissioner for the revocation of the licenses in these cases? It is no answer to say that, if a State may refuse to permit a foreign corporation to do business in the State, or to arbitrarily revoke its license so to do (or, in other words, revoke it for no reason), that, therefore, it may do this for an invalid reason, or under the authority of an unconstitutional statute. A State can only speak through its laws, and if the law is invalid, then the State has not spoken at all. The Commonwealth has not undertaken to prevent foreign corporations from doing business in the State, or to revoke their license so to do "for no reason," or arbitrarily; it has said to its insurance commissioner that he must grant foreign insurance companies license to transact business in this State when they
60 comply with certain requirements, and that he must revoke this license if they remove to the Federal court a suit against them by a citizen of the State. Now, this latter part of the statute is conceded to be void, being in contravention of the laws of the United States; therefore, in reading the statute, it must be omitted, and when this is done, we find no warrant for the action of the commissioner. To illustrate this, take a pen and erase from the face of the statute those parts which are admitted to be invalid, and then it will present its legal attitude towards foreign corporations; and nothing will be left which authorizes the revocation of the license. Of course, this view is predicated upon the theory that the statute is separable, and that the valid part may be segregated from the invalid. If this cannot be done, then the whole statute is void, and there is no law whatever on the subject, and, as a consequence, still less authority (if that were possible) for the revocation.

No practical difference can be pointed out between the statutes of Wisconsin, Iowa, or Kentucky, on the subject under discussion. They were all enacted for the same purpose, and even the verbiage is remarkable in its similarity. In the cases at bar, the corporations bear the same attitude towards the laws of the State of Kentucky as did the corporation toward the laws of the State of Iowa, and the analogy is complete when the license is revoked by the commissioner;

for a corporation whose license is revoked is in precisely the
61 same relation towards the law as one which never had a license. If this be so (and it seems axiomatic), of what avail is the conclusion of the majority, if it results that the revocation of the license is a mere *brutum fulmen*, and that the State is unable to invoke the vindicatory part of the statute because of its invalidity? Is so fine a distinction worth the drawing? It seems to me this must be answered in the negative. And yet this is the precise result of the revocation of the insurance commissioner in these cases, if the opinion in Barron *v.* Burnside expresses the law.

The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one State engaged in litigation with a citizen of another State, on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights, free from the bias of local prejudice or passion. No disinterested mind will deny that this is a just policy. The question then is whether this beneficent policy in the interest of a fair and impartial trial to the foreign citizen may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it) without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from
62 local prejudice or passion in a suit with the citizen. The State statute considers only the convenience of the citizen as measured by the additional distance to the place of trial after removal of the case to the Federal court, and ignores the danger to the foreigner of a miscarriage of justice, on the merits of the controversy, arising from local prejudice or passion in the State tribunal. The existence of such a statute, in itself, affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed.

It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view, to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of benignant laws imposed by ourselves in the interest of a broad and national justice; and that in their practical operation, many more of our own citizens are benefited by them in their litigation in other States than are inconvenienced by them in favor of citizens of foreign States litigating in our Commonwealth.

For the foregoing reasons, I dissent from the opinion of the majority of the court in these cases.

Hazelrigg, Chenault & Hazelrigg, N. B. Hays, att'y gen'l, Henry R. Prewitt, for insurance commissioner.

Wm. Marshall Bullitt, for Security, &c. Ins. Co.

Pirtle, Trabue, Doolan & Cox, Wm. Bro. Smith, for Travelers Ins. Co.

[Stamped:] W. G. Baxter, official copyist court of appeals Kentucky.
[Endorsed:] Jan. 19, 1905.

63 Be it remembered that afterwards on the 27th day of January 1905, there was filed in the office of the clerk of the court of appeals also a petition for writ of error from the United States Supreme Court to *to* the court of appeals of the Commonwealth of Kentucky, which petition is hereto attached and is as follows:

64 In the Court of Appeals of the State of Kentucky, January Term, 1905.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
vs.
THE SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee.
} Petition for Writ of Error.

Appeal from the Jefferson Circuit Court.

To the Honorable J. P. Hobson, chief justice of the court of appeals of the State of Kentucky:

The Security Mutual Life Insurance Company, appellee in the above styled cause respectfully represents that:

On December 15th, 1904 the court of appeals of the State of Kentucky which is the highest court of that State in which a decision in this suit could be had, rendered and made a final judgment or decree herein in favor of the appellant Henry R. Prewitt and against the appellee, The Security Mutual Life Insurance Company, in which final judgment or decree certain errors were committed to the prejudice of this appellee as will appear more in detail from the assignment of errors which is filed with this petition.

In the said suit there was drawn in question the validity of a statute of, and an authority exercised under the State of Kentucky
65 on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity; and a right and privilege was claimed under the Constitution and statutes of the United States and the decision was against the right and privilege specially set up and claimed by the appellee under such Constitution and statutes.

Wherefore the appellee, The Security Mutual Life Insurance Company prays that a writ of error from the Supreme Court of the United States be allowed and may issue to the court of appeals of the State of Kentucky for the correction of the errors so complained of and a reversal of the said final judgment or decree; that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States;

citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the statute in such cases made and provided said bond and writ of error may operate as a supersedeas.

WM. MARSHALL BULLITT,
Counsel for Appellee.

The writ of error as prayed for in the foregoing petition is hereby allowed this 27th day of January, 1905, the writ of error to act as a supersedeas and all further proceedings in this court be suspended and stayed until the said writ of error shall be determined by the Supreme Court of the United States, and the bond for that purpose is fixed at the sum of $500 and is hereby approved.

Dated at Frankfort, Ky. this 27th day of January 1905.

J. P. HOBSON,
Chief Justice of the Court of Appeals
of the State of Ky.

Filed in my office this 27th day of January, 1905.

J. MORGAN CHINN,
Clerk Court of Appeals, State of Kentucky.

[Endorsed:] Filed Jan. 27 1905. J. Morgan Chinn, C. ct.

66 And afterwards there was filed in the office of the clerk of the court of appeals an assignment of errors, and which is hereto attached, and is as follows:—

67 In the Court of Appeals for the State of Kentucky, January Term, 1905.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee.

Assignment of Errors.

Now on the 27th day of January 1905 came the appellee, The Security Mutual Life Insurance Company (hereinafter called the plaintiff in error) by Wm. Marshall Bullitt its counsel, and says that the decision and decree in this cause are erroneous and against its just rights and for error assigns the following:

1. The court erred in holding that Kentucky Statutes § 631 is valid and not repugnant to the Constitution and laws of the United States and that said statute did not make the right of the plaintiff in error to a continuance of the authority to transact its business in the State

of Kentucky dependent upon its surrender of a privilege and right secured to it by the Constitution and laws of the United States.

2. The court erred in holding that the said Kentucky Statute-§ 631 did not deprive a foreign insurance corporation of the right
68 conferred upon it by the Constitution and laws of the United States to remove suits from the State court to the circuit court of the United States for the district of Kentucky in those cases made and provided for by the Constitution and laws of the United States.

3. The court erred in holding that the action of Henry R. Prewitt, insurance commissioner of Kentucky in revoking the authority of the Security Mutual Life Insurance Company and its agents to do business in the State of Kentucky was and is valid and not repugnant to the Constitution and laws of the United States, although said revocation was made pursuant to the provisions of said Kentucky Statutes § 631 aforesaid and for the sole reason that said insurance company had removed from the Owen circuit court in the State of Kentucky to the United States circuit court for the eastern district of Kentucky, the suit of Crain & Gayle against said insurance company mentioned in plaintiff's petition in equity in this cause.

4. The court erred in directing that the bill in equity be dismissed and in holding that a bill in equity would not lie to compel the insurance commissioner of the State of Kentucky to restore to the plaintiff in error its license to do business in this State where pursuant to Kentucky Statutes § 631, which provides that if a foreign insurance company shall remove a suit to the Federal court the insurance commissioner shall forthwith revoke its authority to do business in the State and shall institute proceedings to enjoin it from transacting any further business in the State, the said insurance commissioner had revoked its license for the sole reason that it had removed a case to the Federal court.

69 5. The court erred in not holding that said Kentucky Statutes § 631 and the action of the insurance commissioner thereunder, were and are repugnant to the Constitution and laws of the United States and especially to those several acts of Congress of the United States commonly called the "Removal acts" and the acts amendatory thereof and supplemental thereto which provide for the removal of certain suits from State courts to the Federal courts.

Wherefore, the plaintiff in error prays that the said decree be reversed and that the said court may be directed to enter a decree in accordance with the prayer of the bill.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

[Endorsed:] Filed Jan. 27 1905 J. Morgan Chinn, C. ct.

70 And afterwards there was filed in the office of the clerk of the court of appeals, order allowing writ of error and approving bond, which order is hereto attached and is as follows:—

71 In the Court of Appeals of the State of Kentucky, January Term, 1905.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
vs.
THE SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee. } Order.

The above entitled cause coming on to be heard upon the petition of the appellee therein for a writ of error from the Supreme Court of the United States to the court of appeals of the State of Kentucky, and upon examination of said petition and record in this matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is now ordered that a writ of error be and hereby is allowed to this court from the Supreme Court of the United States and that the bond presented by the said petitioner be and the same hereby is approved.

Dated at Frankfort this 27th day of January 1905.

J. P. HOBSON,
Chief Justice of the Court of Appeals, State of Kentucky.

[Endorsed:] Filed Jan. 27, 1905. J. Morgan Chinn, C. ct.

72 And afterwards there was filed in the office of the clerk of the court of appeals, a writ of error, and which is hereto attached and is as follows:—

73 UNITED STATES OF AMERICA, District of Kentucky, Sixth Judicial Circuit, } ss:

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said court of appeals of the said State of Kentucky, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Security Mutual Life Insurance Company and Henry R. Prewitt, insurance commissioner of the State of Kentucky wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to

the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Security Mutual Life Insurance Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy
74 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of February, 1905, in the said Supreme Court, to be then and there held that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 27 day of January in the year of our Lord one thousand, nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.

Allowed to operate as a supersedeas by

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

[Endorsed:] Filed Jan. 27, 1905. J. Morgan Chinn, C. ct.

75 And afterward there was filed in the office of the clerk of the court of appeals a supersedeas bond and which is in words and figures as follows:—

76 In the Court of Appeals of the State of Kentucky, January Term, 1905.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, Appellant,
vs.
SECURITY MUTUAL LIFE INSURANCE COMPANY, Appellee. } Bond.

Know all men by these presents that we, Security Mutual Life Insurance Company as principal and Thomas W. Bullitt as security are held and firmly bound unto Henry R. Prewitt, insurance commissioner of the State of Kentucky in the sum of five hundred ($500.) dollars, to be paid to the said Henry R. Prewitt, insurance commissioner of the State of Kentucky, his ecutors, or administrators, or successors in office. To which payment well and truly to be made, we bind ourselves and each od us, jointly and severally and our and each of our, heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this twenty-seventh day of January, A. D., 1905.

Whereas the above named Security Mutual Life Insurance Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by the court of appeals of the State of Kentucky,

77 Now, therefore, the condition of this obligation is such, that if the above named Security Mutual Life Insurance Company shall prosecute its said writ or error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
By WM. MARSHALL BULLITT,
Attorney in Fact.
THOMAS BULLIT-, Attorney.

Allowed to operate as a supersedeas by

J. P. HOBSON,
Chief Justice of the Court of Appeals
of the State of Kentucky.

78 And afterwards there was filed in the office of the clerk of the court of appeals, a citation with proof of service endorsed thereon, and which is hereto attached and is as follows:—

79 UNITED STATES OF AMERICA:

To Henry R. Prewitt, insurance commissioner of the State of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C. on the 25th day of February 1905 next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Security Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justive of the United States, this 27th day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-ninth.

J. P. HOBSON,
Chief Justice of the Court of Appeals
of the State of Kentucky.

Service of the within citation is hereby acknowledged this 27th day of January 1905.

HENRY R. PREWITT,
Insurance Commissioner of the State of Kentucky.

[Endorsed:] Filed Jan. 27 1905. J. Morgan Chinn, C. ct.

80 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

I J. Morgan Chinn, clerk of the court of appeals of the Commonwealth of Kentucky, do hereby certify that the foregoing pages contain a full true and complete copy and transcript of the record and proceedings had in the court of appeals of the Commonwealth of Kentucky including the opinion of the said court in the action of Henry R. Prewitt insurance commissioner of State of Kentucky, appellant, *vs.* The Security Mutual Life Insurance Company of Binghamtown, N. Y., appellee, as full and complete as the same remain on file and of record in my office, which I herewith transmit in pursuance of the writ of error thereto attached.

I also further certify that with said transcript is attached the original petition for writ of error, the original assignment of errors, the original order allowing the writ of error and approving the bond, and a copy of the bond.

I also further certify that *that* the original citation with the proof of service, endorsed thereon, and the original writ of error are hereto attached, and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court. Done at Frankfort at the capitol at Frankfort, on the 28th day of January, A. D. 1905.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 19,630. Kentucky court of appeals. Term No. 530. Security Mutual Life Insurance Company, plaintiff in error, *vs.* Henry R. Prewitt, insurance commissioner of the State of Kentucky. Filed February 13th, 1905. File No. 19,630.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

THE SECURITY MUTUAL LIFE INSURANCE COMPANY, - - - - - - - - - - - - - *Plaintiff in Error*,

vs. No. 178.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, - - - - *Defendant in Error*

SUGGESTIONS FOR PLAINTIFF IN ERROR ON MOTION TO ADVANCE.

The defendant in error, the Insurance Commissioner of Kentucky, has moved that this case be advanced for oral argument.

The plaintiff in error has concurred in the request, and offers the following suggestions upon the motion.

Although the case is not, perhaps, strictly speaking, one that falls within Rev. Stat., §949, providing for the advance on the docket of a case where a State is a party, yet it comes within the principle of the statute, as well as involving questions of great importance to the State of Kentucky.

Ky. Stat., §631, provides that if a foreign insurance company shall remove a case to the Federal Court, its license shall be revoked. The plaintiff in error having removed a case to the Federal Court, the Insurance Commissioner revoked its license, and the present suit was then instituted in the *State court* for a mandatory injunction compelling a restoration of the license. The highest court in Kentucky decided that §631 was constitutional, and refused the relief prayed for.

The sole question, therefore, involved is whether or not a State statute is constitutional which provides that if a foreign insurance company removes a case to the Federal Court, its license shall be revoked.

Various aspects of this question have been presented in *Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 435; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, and *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288.

The defendant in error, the Insurance Commissioner, insists that it is his right and duty to prevent any insurance company from removing a case to the Federal Court by revoking the license of every company that removes a case. This view was sustained by the highest court of the State. The result is to deny the right of removal to hundreds of insurance companies doing business in the State of Kentucky. The right of removal guaranteed by the Federal Constitution is suspended, so far as *insurance companies* are concerned, although no such rule is enforced against *any other class* of foreign corporations.

Upon the hearing of this case, the plaintiff in error, Security Mutual Life Insurance Company, will insist upon the following propositions:

FIRST POINT.

A State may entirely exclude foreign insurance companies from its limits, or it may prescribe the terms on which they may enter, provided such terms are not repugnant to the Constitution or laws of the United States.

Paul v. *Virginia*, 8 Wall. 168;
Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 344;
Hooper v. *California*, 155 U. S. 648, 655;
Insurance Company v. *Morse*, 20 Wall. 445, 456;
Barron v. *Burnside*, 121 U. S. 186, 200;
Blake v. *McClung*, 172 U. S. 239, 254;
Dayton Coal Co. v. *Barton*, 183 U. S. 23, 25.

SECOND POINT.

Ky. Stat., §631, providing that if a foreign insurance company shall remove a case to the Federal Court, the Insurance Commissioner shall revoke its license, is unconstitutional because repugnant to the constitution and laws of the United States, in that it destroys a right guaranteed thereunder.

1. **Ky. Stat., §631, prohibits the exercise of a Federal right by reason of the imposition of a crushing penalty for exercising such Federal right.**
2. **Ky. Stat., §631, prohibits the removal of a case to the Federal Court**

Lafayette Ins. Co. v. *French*, 18 How. 404;
Paul v. *Virginia*, 8 Wall. 168;
Ducat v. *Chicago*, 10 Wall. 410;
Insurance Co. v. *Morse*, 20 Wall. 445;
Doyle v. *Continental Insurance Co.*, 94 U. S. 535;
Barron v. *Burnside*, 121 U. S. 186;
Southern Pacific v. *Denton*, 146 U. S. 202;
Commonwealth v. *East Tennessee Coal Co.*, 97 Ky. 238;
Commonwealth v. *Jellico Coal Co.*, 97 Ky. 246.

THIRD POINT.

The Insurance Commissioner having (pursuant to Ky. Stat., §631) revoked the Security Mutual's license solely because it had removed a case to the Federal Court, the State court should have granted an injunction commanding him to restore the license. No State officer can take any valid action under a State statute which is in conflict with the Federal Constitution.

Norton v. *Shelby County*, 118 U. S. 425, 442;
Cooley's Constitutional Limitations, 188.

In view of the embarrassment from which the Insurance Commissioner and all the insurance companies in Kentucky are now suffering, as the result of the decision in this case, the plaintiff in error joins in the request that the case be advanced. The Insurance Commissioner recognizes that there may be a doubt as to his power to revoke the license, and yet insurance companies are unable to remove cases to the Federal Court except under the penalty of having their license immediately revoked, and being expelled from the State.

WM. MARSHALL BULLITT,
Counsel for Security Mutual Life Insurance Company,
Plaintiff in Error.

FILE COPY.

CONSTITUTIONALITY OF THE KENTUCKY STATUTE AGAINST REMOVALS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 178.

Office Supreme Court U. S.
FILED
JAN 12 1906
JAMES H. McKENNEY,
Clerk.

THE SECURITY MUTUAL LIFE INSURANCE COMPANY, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, ... *Defendant in Error.*

On Writ of Error to the Court of Appeals of the State of Kentucky.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR

In support of the contention that Kentucky Statutes, §631, providing that if a foreign insurance company shall remove a case to the Federal Court, the Commissioner of Insurance shall revoke its license, is unconstitutional.

F. W. JENKINS,
JULIEN T. DAVIES,
CHAS. S. GRUBBS,
WM. MARSHALL BULLITT,

Counsel for The Security Mutual Life Insurance Company, Plaintiff in Error.

John P. Morton & Company, Louisville, Ky.

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STATEMENT OF THE FACTS . . . . . 1—7

ASSIGNMENT OF ERRORS . . . . . 8—11

FIRST POINT.

For the purposes of this case (but not otherwise) it may be conceded that a State may entirely exclude foreign insurance companies from its limits, or it may prescribe the terms on which they may enter, provided such terms are not repugnant to the Constitution or laws of the United States. . . . . 12—17

Paul v. *Virginia*, 8 Wall. 168;
Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 344;
Cowell v. *Springs Co.*, 100 U. S. 55, 59;
Christian Union v. *Younts*, 101 U. S. 352, 356;
Cooper Mfg. Co. v. *Ferguson*, 113 U. S. 727;
Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315;
Hooper v. *California*, 155 U. S. 648, 655;
Waters-Pierce Oil Co. v. *Texas*, 177 U. S. 28, 46;
New York Life Ins. Co. v. *Cravens*, 178 U. S. 389, 397;
Lafayette Ins. Co. v. *French*, 18 How. 404, 407;
Insurance Co. v. *Morse*, 20 Wall. 445, 456;
Barron v. *Burnside*, 121 U. S. 186, 200;
Blake v. *McClung*, 172 U. S. 239, 254;
Dayton Coal Co. v. *Barlon*, 183 U. S. 23, 25;
Beale on Foreign Corporations, § 104;
13 Am. & Eng. Encyl. Law, 838, 839.

SECOND POINT.

Ky. Stat. § 631, providing that if a foreign insurance company shall remove a case to the Federal Court, the Commissioner of Insurance shall revoke its license, is unconstitutional, because repugnant to the Constitution and laws of the United States, in that it practically destroys a right guaranteed thereunder. . . . . 18—99

I. Ky. Stat. § 631 imposes a burdensome condition on the exercise of a Federal right (p. 20—31, infra).

II. Ky. Stat. § 631 prohibits, in effect, the removal of a case to the Federal Courts, and imposes a penalty for exercising a Federal right (p. 32—38, infra).

III. A review of the authorities on the constitutionality of similar statutes of Wisconsin, Iowa, Texas, and Kentucky (p. 39—81, infra).

1. *Lafayette Ins. Co.* v. *French*, 18 How. 404;
Paul v. *Virginia*, 8 Wall. 168;
Ducat v. *Chicago*, 10 Wall. 410;
Insurance Co. v. *Morse*, 20 Wall. 445;
Doyle v. *Continental Ins. Co.*, 94 U. S. 535;
Barron v. *Burnside*, 121 U. S. 186;
Southern Pacific Co. v. *Denton*, 146 U. S. 202;
Commonwealth v. *East Tennessee Coal Co.*, 97 Ky. 238;
Commonwealth v. *Jellico Coal Co.*, 97 Ky. 246.

2. Critical analysis of the reasoning in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535 (p. 50—58, infra).

IV. A review of the opinion of the Court of Appeals of Kentucky in the case at bar (p. 82, infra).

A. Analysis of the statutes of various States (p. 82—88, infra).

B. Barron v. *Burnside* overruled *Doyle* v. *Insurance Co.* (p. 89—96 infra).

C. The analogy relied on is faulty (p. 97—99, infra).

THIRD POINT.

The Insurance Commissioner having revoked the Security Mutual's license pursuant to Ky. Stat. § 631, and solely because it had removed a case to the Federal Courts, an injunction should be granted commanding him to restore the license . . . . . 100—105

Norton v. *Shelby County*, 118 U. S. 425, 442;
Cooley's Constitutional Limitations, 188.

CONCLUSION 106

APPENDIX, containing Ky. Stat. §§ 572, 634, 631, 633, 754, 753 . . . . . 107—110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905. No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY, ... , *PLAINTIFF IN ERROR,*

VERSUS

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, ... *DEFENDANT IN ERROR.*

On writ of error to the Court of Appeals of the State of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

The plaintiff in error, the Security Mutual Life Insurance Company (hereinafter called the **Security Mutual**), filed its petition in equity in the Jefferson Circuit Court at Louisville, Kentucky, against the defendant in error, **Henry R. Prewitt**, Insurance Commissioner of the State of Kentucky, praying for an injunction to compel him to restore authority to it and its agents to do business in Kentucky—he having revoked it under Ky. Stat., §631, because the Security

Mutual had removed a case to the Federal Court (Record, 2–6).

The defendant demurred to the petition (R. 7); the demurrer was overruled (R. 8–12); the defendant declined to plead further (R. 12); a judgment was entered granting the relief sought for, viz: an order compelling a restoration of the authority to do business and restraining the defendant from interfering with the plaintiff's conduct of its business (R. 12); and the defendant, Insurance Commissioner, appealed to the Court of Appeals of Kentucky (R. 12, 13).

The Court of Appeals, in an opinion by HOBSON, J., reversed the lower court and remanded the cause with instructions to dismiss the petition (*Prewitt* v. *Security Mutual Life Ins. Co.*, 26 Ky. Law Rep. 1239; S. C. 83 S. W. 611, R. 14–20); BURNAM, C. J., and BARKER, J., dissented, the latter delivering a strong dissenting opinion (27 Ky. Law Rep. 77; S. C. 84 S. W. 527, R. 21–30).

Thereupon this writ of error was sued out (R. 31 *et seq.*).

The petition avers, and the demurrer concedes, the following

STATEMENT OF FACTS.

1. The Security Mutual is a foreign life insurance company, which, having complied with all the requirements of the laws of Kentucky, was in the year 1900 duly admitted to do business in this State; the then Insurance Commissioner granted it authority to do business, which was renewed annually thereafter, and it expended a large amount of money in advertising and establishing its business in this State, which business is now large, profitable, and valuable (R. 2, 3).

2. Sections 35 and 94 of an Act of the General Assembly of the State of Kentucky, entitled "*An Act Providing for the Creation and Regulation of Private Corporations*," which became a law April 5, 1893, provide respectively as follows, to wit (R. 4).

Section 35 (which is also known as Ky. Statutes, §572):

> §572. **Action—removal to or institution in Federal Court forbidden—penalty.**—If any foreign corporation shall, without the consent of the adverse party, *remove to a Federal Court* any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal

Court of this State, *such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State*, and such corporation, and any officer, agent, or employe thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and upon indictment, and conviction in the circuit court of any county in which such corporation, or any officer, agent, or employe thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

Section 94 (which is also known as Ky. Statutes, §631):

"**§631. Foreign corporation—process—action—removal to or institution in Federal Court forbidden.**—Before authority is granted to any foreign insurance company to do business in this State it must file with the Commissioner a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office;* *and if any company shall*, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, *remove said suit or proceeding to*

*Down to this point the provisions of §631 are, strictly speaking, conditions precedent to admission, are reasonable, and not open to objection. The remaining portion of the section is a regulation of the company after it is admitted, and we claim it is unconstitutional.

any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, *it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State*, and to publish such revocation in some newspaper of general circulation published in the State."

It was further provided by Ky. Stats., §§633, 753, 754, (1) that the agents and policy-holders of any company removing a case be notified of the revocation of its right to do business in the State, (2) that all agents who should thereafter transact any business should be deemed guilty of a misdemeanor and fined from $50 to $100, and (3) that proceedings should be instituted in a State court and an injunction obtained restraining the company from further transacting any business in the State.*

3. A suit was brought in the Owen Circuit Court by Crain & Gayle against the Security Mutual for $100,000 damages for breach of contract for personal services as agents; and on September 23, 1904, the Security Mutual removed the case to the Federal Court on the ground of diverse citizenship (R. 3).

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*All of the provisions of the Kentucky Statutes on the subject will be found in the Appendix (p. 107—110, *infra*).

4. Crain & Gayle immediately notified the Insurance Commissioner of the removal, and demanded that he should revoke the authority of the Security Mutual to do business in Kentucky (R. 4).

5. On September 29, 1904, the Insurance Commissioner (*pursuant* to Kentucky Statutes, §572 and §631, *supra*, and for the *sole reason* that it had removed a case to the Federal Court) revoked all authority of the Security Mutual and its agents to do business in Kentucky, and published a notice of such revocation in a newspaper of general circulation published in Kentucky (R. 4, 5), and he was about to carry out the other provisions of the law above mentioned.

The Security Mutual demanded that the defendant restore its license, but he refused to do so, for the *sole reason* that it had removed a case to the Federal Court (R. 5).

Thereupon the Security Mutual brought this suit to obtain an injunction compelling the Insurance Commissioner to cancel his revocation, and to restore to the Security Mutual its right to do business in Kentucky (R. 2–6).

The lower court (GORDON, J.) was of the opinion that *Doyle* v. *Insurance Co.*, 94 U. S. 535 (1877), was overruled by *Barron* v. *Burnside*, 121 U. S. 186 (1887), and accordingly held, on the authority of *Barron* v. *Burnside* and *Commonwealth* v. *East Tennessee Coal Co.*, 97 Ky. 238 (1895), that Ky. Stats., §§572 and 631, were unconstitutional, in that they obstructed the right of removal given to a foreign corporation by the Constitution and laws of the United States, and that therefore the Insurance Commissioner had no authority to revoke the Security Mutual's license, and must restore it (R. 8–12).

On appeal, the Court of Appeals (HOBSON, J.) decided that *Doyle* v. *Insurance Co.* was not overruled by *Barron* v. *Burnside*; undertook to distinguish between them; adopted the reasoning in *Doyle* v. *Insurance Co.*; decided that Ky. Stat., §631, was valid, and reversed the case with instructions to dismiss the petition (R. 14–20).

The dissenting opinion of Judge Barker is a complete answer to the majority opinion (R. 21–30).

ASSIGNMENT OF ERRORS.

There are five errors assigned, but they are all simply different methods of raising the same point, to wit: the claim of the plaintiff in error that Ky. Stat., §631, is unconstitutional because in conflict with the Constitution and laws of the United States regarding the removal of causes, in that it requires a foreign insurance company, as a condition of transacting business in the State, to surrender a right guaranteed under the Federal Constitution, and thereby abridges such right (R. 32, 33).

The errors assigned are as follows (R. 32, 33):

1. The court erred in holding that Kentucky Statutes §631 is valid and not repugnant to the Constitution and laws of the United States and that said statute did not make the right of the plaintiff in error to a continuance of the authority to transact its business in the State of Kentucky dependent upon its surrender of a privilege and right secured to it by the Constitution and laws of the United States.

2. The court erred in holding that the said Kentucky Statute §631 did not deprive a foreign insurance corporation of the right conferred upon it by the Constitution and laws of the United States to remove suits from the State court to the circuit court of the United States for the district of Kentucky in those cases made and provided for by the Constitution and laws of the United States.

3. The court erred in holding that the action of Henry R. Prewitt, Insurance Commissioner of Kentucky, in revoking the authority of the Security Mutual Life Insurance Company and its agents to do business in the State of Kentucky was and is valid and not repugnant to the Constitution and laws of the United States, although said revocation was made pursuant to the provisions of said Kentucky Statutes §631 aforesaid and for the sole reason that said insurance company had removed from the Owen Circuit Court in the State of Kentucky to the United States Circuit Court for the eastern district of Kentucky, the suit of Crain & Gayle against said insurance company mentioned in plaintiff's petition in equity in this cause.

4. The court erred in directing that the bill in equity be dismissed and in holding that a bill in equity would not lie to compel the Insurance Commissioner of the State of Kentucky to restore to the plaintiff in error its license to do business in this State where pursuant to Kentucky Statutes §631, which provides that if a foreign insurance company shall remove a suit to the Federal court the Insurance Commissioner shall forthwith revoke its authority to do business in the State and shall institute proceedings to enjoin it from transacting any further business in the State, the said Insurance Commissioner had revoked its license for the sole reason that it had removed a case to the Federal Court.

5. The court erred in not holding that said Kentucky Statutes §631 and the action of the Insurance Commissioner thereunder, were and are repugnant to the Constitution and laws of the United States and especially to those several acts of Congress of the United States commonly called the "Removal acts" and the acts amendatory thereof and supplemental thereto which provide for the removal of certain suits from State courts to the Federal courts.

SUMMARY OF POINTS DISCUSSED.

1. For the purposes of this case (but not otherwise) it may be conceded that a State may entirely exclude foreign insurance companies from its limits, or it may prescribe the terms on which they may enter, provided such terms are not repugnant to the Constitution or laws of the United States (p. 12—17 infra).

2. Kentucky Statutes §631 (providing that if a foreign insurance company removes a case to the Federal Court, the Commissioner of Insurance shall revoke its license) is unconstitutional, because repugnant to the Constitution and laws of the United States—in that it practically destroys a right guaranteed thereunder (p. 18—99 infra).

3. The Insurance Commissioner, having revoked the Security Mutual's license, pursuant to Ky. Stat. §631, and solely because it had removed a case to the Federal Courts, an injunction was properly granted commanding him to restore the license (p. 100—105 infra).

FIRST POINT.

For the purposes of this case (but not otherwise) it may be conceded that a State may entirely exclude foreign insurance companies from its limits, or it may prescribe the terms on which they may enter, provided such terms are not repugnant to the Constitution or laws of the United States.

At common law a corporation could have no existence outside the sovereignty creating it, but by the doctrine of comity (which was not a matter of courtesy or good will to be extended or withheld by the courts at discretion, but was a positive rule of law), corporations of one nation were allowed to do business in and to use the courts of other nations;* and, of course, any county or State could, by statute, change the common law rule of comity and exclude† foreign corporations, or prescribe such terms

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*The right of a corporation to do business in a foreign country has sometimes been said to be a matter of comity, not of law, as though there were a distinction between them. That is not the case; there is no discretion in the court to admit or refuse at will. As a strict matter of *law* (resulting from the comity of nations) a foreign corporation *has the right* to do business until forbidden by statute or a settled course of judicial decisions. The State may cease to recognize the right of a foreign corporation to do business in its limits, but in doing so the State is simply altering the common law in the same way that it may alter any other part of its law. (Beale on Foreign Corporations, §104.)

†Throughout this brief the word "exclude" is used in the sense of *refusing to admit;* while the word "expel" is used in the sense of *forcing out after once having been admitted.*

of admission or regulation of conduct as it saw fit. The Federal Constitution, however, introduced important limitations on the powers of the States as independent sovereignties with respect to foreign corporations, and the States no longer possess the absolute right either to exclude all corporations at will or to prescribe arbitrarily the terms of admission or continuance within their limits.

Although it has been loosely stated (as in *Paul* v. *Virginia*, 8 Wall. 168, 181, and *Hooper* v. *California*, 155 U. S. 652, 656) that a State may entirely exclude foreign corporations, or may prescribe such conditions of admittance as it thinks fit, the Supreme Court has repeatedly pointed out (as in *Insurance Co.* v. *Morse*, 20 Wall. 445, 456, and *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314) that such expressions were subject to the qualification that there were certain classes of corporations that could not be excluded at all, and, with reference to all other corporations, the conditions prescribed must not be repugnant to the Federal Constitution.*

*For example, a State can not exclude from its limits a foreign corporation engaged in inter-state commerce (*Pensacola Telegraph*

While a State may entirely exclude some corporations, which for the purposes of this case only, may be conceded to include a life insurance company, it does *not* follow that the State may, without restraint, name the conditions on which it may be admitted or allowed to remain; for if a State once passes beyond the sphere of absolute exclusion into the realm of a conditional admittance, important limitations are imposed upon the State with respect to its power to prescribe those conditions. There are some terms which a State can not lawfully exact as the condition of admitting foreign corporations, or of allowing them to remain after they have been admitted.

As a result of the decisions of the Supreme Court, the following propositions are well established:

1. A State may, by a valid affirmative expression, prohibit the entrance of or expel all foreign corporations which are not engaged in

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Co. v. *Western Union Tel. Co.*, 96 U. S. 1), nor one employed in doing work under authority of Congress (*Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, 14), nor engaged in any Federal function (*Horn Silver Mining Co.* v. *New York*, 143 N. Y. 305, 314). A State can not provide as a term of admission that the corporation will not remove a case to the Federal Courts (*Insurance Co.* v. *Morse*, 20 Wall. 445). Neither can a State prevent a foreign corporation from doing business because it refused to obtain a license under a statute providing for a revocation of the business if it removed a case to the Federal Court. (*Barron* v. *Burnside*, 121 U. S. 186.)

inter-state commerce or in performing a Federal function (*Paul* v. *Virginia*, 8 Wall. 168, 181; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314).

2. Until a State has decided otherwise, by some valid affirmative direct enactment to the contrary, a foreign corporation has the right, by virtue of the common law rule of "comity," to enter any State and transact its business (13 Am. and Eng. Encyc. Law, 838, 839; *Cowell* v. *Springs Co.*, 100 U. S. 55, 59; *Christian Union* v. *Yount*, 101 U. S. 352, 356).

The principle of comity does not mean "courtesy," but is as much a part of the law of the land as any other legal principle; it exists at common law, and is operative until changed by statute (Beale on Foreign Corporations, §104).

3. A State (subject to the provisions of the Federal Constitution) may prescribe the terms or conditions upon which a foreign corporation (except those engaged in inter-state commerce, etc.) will be admitted to carry on their business (*Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 732; *Horn Silver Mining Co.* v. *New York*, 143

U. S. 305, 315; *Hooper* v. *California*, 155 U. S. 648, 655; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 397).

4. But the terms or conditions of admission must not be inconsistent with the Federal Constitution, for there is a limit beyond which a State can not go, to wit: it can not prescribe terms, the effect of which will be to abridge or deprive the corporation of a right guaranteed to it by the Constitution and laws of the United States (*Lafayette Ins. Co.* v. *French*, 18 How. 404, 407; *Insurance Co.* v. *Morse*, 20 Wall. 445, 456; *Barron* v. *Burnside*, 121 U. S. 186, 200; *Blake* v. *McClung*, 172 U. S. 239, 254, 255; *Dayton Coal Co.* v. *Barton*, 183 U. S. 23, 25).

It may therefore be regarded as settled that there are *some* limitations on the power of the States respecting the exclusion, admission, or expulsion of foreign corporations, and consequently every exercise of the power of the State is subject to review.

In any given case the question is whether the particular State statute is or is not repug-

nant to the Federal Constitution, and while it may be difficult to formulate any rule to cover all cases, it can be safely stated that any State statute is void which either interferes with the powers of the National Government or obstructs the exercise of some right guaranteed to a corporation by the Federal Constitution, or deprives it of such right.

SECOND POINT.

Ky. Stat. §631, providing that if a foreign insurance company shall remove a case to the Federal Court the Commissioner of Insurance shall revoke its license, is unconstitutional, because repugnant to the Constitution and laws of the United States, in that it practically destroys a right guaranteed thereunder.

Ky. Stat., §631 (omitting immaterial parts), provides as follows:

> "If any (foreign insurance) company shall remove a suit to any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State."*

Its manifest object is to deter removals to the Federal Court by providing that if a corporation removes a case to the Federal Court it shall be expelled from the State; indeed, the very title of the section declares that removals

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*It will be observed that the State of Kentucky does not attempt to exclude foreign insurance companies generally. On the contrary, it provides that when they shall have complied with a few simple regulations, such as filing a copy of their charter, appointing an agent on whom process can be served, etc., they can do business in the State, and the Insurance Commissioner *must* issue a license. It is then provided that if a case is removed to the Federal Court, he shall revoke the license, and Ky. Stats. §633, §638, §752, and §753 prohibit the transaction of insurance without a license, impose fines for a violation thereof, make it the duty of the Commissioner to institute suit to enjoin the further transaction of business, and to publish the fact in the newspapers, thereby expelling a company from the State if it removes a case.

are forbidden, to wit, "Action—removal to or institution in Federal Court *forbidden*."

Is such a provision repugnant to the Constitution and laws of the United States?

The right of a State to exclude or to prescribe conditions of admission or terms under which a foreign corporation may transact business is merely a *common law rule*, and its exercise is subordinate to the Federal Constitution. By all the analogies of constitutional law every statute is void which obstructs or prevents the exercise of any Federal right. That rule condemns the statute in question.

The Constitution of the United States (Article III) and the Act of Congress of 1887-8 confer upon foreign corporations the right of removal to the Federal Courts on the ground of diverse citizenship; and as Article VI provides that the Constitution and the laws made in pursuance thereof shall be the "supreme law of the land," these provisions act as an implied condition or limitation upon every power of the State.

I.

A. The right to resort to the Federal Court is a right guaranteed under the Constitution of the United States, and any statute of the State which undertakes to abridge it must be held void.

By "abridge" we do not mean to restrict the meaning of the term to actually prohibiting a removal itself in a particular case; but by "abridge" we mean that any statute which undertakes directly to prevent or indirectly to hinder or deter removals by imposing a penalty or burden upon one who thus removes a case, must be held void.

Congress has the exclusive right to regulate the removal of causes, and having prescribed the conditions under which cases can be removed, and the effect thereof, that is the equivalent of declaring that there shall be no other conditions attached to the subject, and that no State shall annex any other term either as a condition precedent or a condition subsequent to the exercise of such right.

The Kentucky Statute adds a condition *subsequent* to a removal. It says that if and

when a case is removed the company's license shall be revoked by the Commissioner of Insurance. That is a condition of removal not contemplated by Congress, for the State says that in addition to the filing of the petition, bond, etc., the company must at the instant of removal cease to do business in the State.

Although the statute does not prescribe anything to be done *before* the removal, it fixes a result to follow thereafter, and in either case it is equally void.

Suppose a State imposed a tax of $10 on every transaction of removing a cause to the Federal Court. Would not that be void? Would it not be equally void whether it were imposed as a condition or as a result of removal?

Suppose then, that the State provided that if a foreign insurance company removed a case, it should immediately thereafter pay into the State treasury a fee of $10 or a percentage of the amount in controversy. Such a statute would not *prevent* a removal in any different sense than the present statute, and yet it would certainly be void as *imposing a burden* on and obstructing the exercise of a Federal right. Is it not equally true that a statute declaring

that if a corporation removes a case to the Federal Court, it shall forfeit its right to do business in the State and thereby lose a large amount of money which it had invested in its business, has imposed in the most burdensome way a penalty upon removals?

If a State can not impose a monetary tax on removals, how can it impose the far greater burden of destroying (by expulsion) a large business built up at great expense?

In short, the so-called power of the State over the admission of corporations is subject to the limitation that its exercise must not directly or indirectly hamper or deter the full and free exercise of constitutional rights. A deterrent effect may be exercised as effectually by prescribing what shall follow, as to prescribe what shall precede, the exercise of such right.

The power of Congress over the removal of causes is quite as broad as its power to regulate commerce,* and yet it has been repeatedly held that a State can not discriminate against the citizens or products of other States (*Railroad* v.

*Indeed it is even broader, for the power to regulate commerce is partly concurrent, while the power to regulate removals is exclusively in Congress.

Husen, 95 U. S. 465; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62; *Tiernan* v. *Rinker*, 102 U. S. 123; *Guy* v. *Baltimore*, 100 U. S. 434; *Welton* v. *Missouri*, 91 U. S. 275; *Walling* v. *Michigan*, 116 U. S. 446); nor impose a tax on inter-state commerce either by a tax laid on the transportation of the subjects of that commerce (*Case of State Freight Tax*, 15 Wall. 232, 279; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 465; *People* v. *Compagnie, &c., Transatlantique*, 107 U. S. 59) or by a tax on the receipts derived from that transportation or upon the capital stock of the carrier (*Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Western Union* v. *Alabama*, 132 U. S. 472; *Pensacola Tel. Co.* v. *Western U. Tel. Co.*, 96 U. S. 1; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union* v. *Pennsylvania*, 128 U. S. 39; *Id.* v. *Mass.*, 125 U. S. 530; *Fargo* v. *Michigan*, 121 U. S. 230; *California* v. *Central Pacific*, 127 U. S. 1; *Gloucester Ferry Co.* v. *Pa.*, 114 U. S. 196), or by means of a license fee on the privilege or occupation of engaging in inter-state commerce (*Robbins* v. *Shelby Co.*, 120 U. S. [illegible]9; *Corson* v. *Maryland*, 120 U. S. 502;

Leloup v. *Mobile*, 127 U. S. 640; *Harman* v. *Chicago*, 147 U. S. 396; *Brennan* v. *Titusville*, 153 U. S. 289; *Moran* v. *New Orleans*, 112 U. S. 69; *Asher* v. *Texas*, 128 U. S. 129; *McCall* v. *California*, 136 U. S. 104; *N. & W. R. Co.* v. *Pa.*, 136 U. S. 114; *Crutcher* v. *Ky.*, 141 U. S. 47; *Henderson* v. *Mayor*, 92 U. S. 259; *Pickard* v. *Pullman Co.*, 117 U. S. 34; *Webber* v. *Va.*, 103 U. S. 344; *Stoutenburg* v. *Hennick*, 129 U. S. 141); nor can a State in any way attempt to regulate inter-state commerce by *imposing burdensome conditions* under which it may be conducted, whether by fixing rates (*Wabash R. Co.* v. *Illinois*, 118 U. S. 557; *Covington Bridge Co.* v. *Ky.*, 154 U. S. 204), or preventing the introduction of certain articles of commerce (*Bowman* v. *Chicago R'y Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100); or by requiring telegraphic messages to be sent in the order received and delivered by messengers within one mile of the office (*Western Union* v. *Pendleton*, 122 U. S. 347); or by requiring common carriers to give equal passenger accommodations without distinction on account of race or color (*Hall* v. *De Cuir*, 95 U. S. 485).

The list might be multiplied indefinitely.

All such State legislation has been annulled because, Congress having the power to regulate commerce, the States have no right to enact laws which shall either abridge a person's right to engage in it or in any way impede or hinder or impose conditions or impediments thereto; in short, free commercial intercourse must not be embarrassed. Embarrassment means not only *prevention* of the commerce itself, but also the attachment of any results to its transactions not authorized by Congress.

So in *Easton* v. *Iowa*, 188 U. S. 220 (1903), it was held that as Congress had the sole power to regulate national banks, a statute of Iowa was void which provided a penalty for any banker receiving a deposit at a time when he knew the bank was insolvent.

Applying the analogy, we see that Congress has exclusive power to regulate removals. It has prescribed all the terms on the subject. A State can not add to them. It can no more say that if a corporation removes a case it shall be expelled, or its license revoked, than it can say that if a corporation engages in inter-state commerce it shall after so engaging pay the State a percentage of its receipts. In each case

the State is fixing an effect that is to flow upon the exercise of a constitutional right, and in each case the act is void.

In *Lafayette Ins. Co.* v. *French*, 18 How. 404, the court said that the terms which a State could impose in admitting a foreign corporation must not be "inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others."

Now the statute in question undoubtedly encroaches upon the authority and jurisdiction of Congress with respect to removals.

B. The subject may be viewed in another light.

A State can not tax or punish a person for or prevent him from exercising any right conferred by the Constitution and laws of the United States.*

*For example, a State could not imprison or fine one of its own citizens (individual or corporate) for bringing a suit in a Federal Court, nor impose a tax or fine on a person because he voted for as Congressional candidate (*Wiley* v. *Sinkler*, 179 U. S. 58), or because he gave information to the United States of a crime against its laws (*In re Quarles*, 158 U. S. 532), or because he protected a Federal judge (*In re Neagle*, 135 U. S.), or desired to travel from one State to another (*Crandall* v. *Nevada*, 6 Wall. 35), the obvious reason being that a State can not punish one for doing what one has a right to do.

Now Ky. Stat., §631, is a direct punishment imposed on a foreign insurance company as a penalty for exercising the constitutional right of removing a case to the Federal Court, and is therefore void. It is no answer to say that the statute does not prohibit or prevent a removal in any particular case, and therefore that it is not punitive, or that it merely gives the company the option of abstaining from the Federal Court or getting out of the State. As well say that a statute against murder imposes no penalty, but merely gives a man the free option of committing murder or being hanged. A statute can be prohibitive and impose a penalty, without *in terms* expressly prohibiting the act penalized.

A few illustrations will help us to see exactly what is involved in this subject.

Suppose a State statute read:

> §1. No foreign corporation shall remove a suit to the Federal Court unless the amount in controversy is $10,000 or over.
>
> §2. If any foreign corporation violates §1 of this act, such corporation shall be fined $1,000 or expelled from the State, or both, in the discretion of the jury.

If a corporation desired to remove a case involving only $5,000, obviously the State could not prevent the removal itself, for the reason that §1 would be void because in conflict with the Act of Congress allowing removals where $2,000 is involved.

Suppose, however, that after the removal was effected, the State undertook to indict and punish the company. Could it do so? Clearly not, for §1, prohibiting removals, being void, it is exactly as though it never had been enacted. There is, therefore, nothing on which to base the penalty, and it becomes inoperative. In short, a punishing clause dependent on a void prohibiting clause is itself void. (*Easton* v. *Iowa*, 188 U. S. 220, 228.)

Suppose the statute (instead of having two sections, one prohibitory and the other penal) read as follows:

> If any foreign corporation shall remove a case to the Federal Court where the amount in controversy is less than $10,000 it shall be fined $1,000 or expelled from the State, etc.

If a corporation removed a case involving only $5,000, could the State enforce the fine? Of course not, for there is absolutely no differ-

ence between the two examples, and both statutes would be void.

Thus, a statute providing that:

> If a man commits forgery, he shall be imprisoned,

prohibits forgery just as much as if it read:

> No man shall commit forgery; if he does, he shall be imprisoned.*

In short, a statute may be just as prohibitory without saying in so many words that something shall not be done, as by expressly prohibiting the thing. An act made punishable is just as much prohibited as the same act prohibited in express terms and a punishment affixed (13 Amer. & Eng. Encyc. Law, 2d Ed., 57).

We submit, therefore:

First: That Ky. Stat., §631, practically prohibits the exercise of a Federal right.

It is void because it prohibits a removal to the Federal Courts as completely as if it read:

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*It may be observed that, as far as we recall, the Kentucky Statutes do not in terms forbid a single felony. The universal form is that if a man commits such and such a crime, he shall suffer such and such a penalty (Ky. Stat. §1148 *et seq.*); as for example (§1181): "If any person shall forge . . . he shall be confined in the penitentiary not less than five nor more than fifteen years."

§1. No foreign insurance company shall remove a case to the Federal Court.

§2. If any such corporation violates §1 hereof, the Commissioner of Insurance shall expel it.

Second: That Ky. Stats., §631, prohibits in effect the removal of a case to the Federal courts by means of the imposition of an unendurable penalty for exercising a Federal right.

Therefore, it is void because it imposes a penalty for removing a case to the Federal Court. If the penalty were a money fine or imprisonment of its officers, every one would agree that it was void. Merely varying the nature or form of the penalty does not make the statute valid.

Expulsion from the State is a far more burdensome penalty than a fine.

It may be suggested that there is some difference between a State revoking a license and imposing a fine or tax, and that the State has some greater right to revoke the former than to impose the latter.

Such a view must be promptly rejected. There is no magic about a license or the State's

power to revoke it. It is simply the exercise of the common law power to change the rule of comity and expel a foreign corporation. That common law power is certainly no more absolute than the power to tax or the power to punish by fine.

The true principle is that a State can not impose any sort of punishment, fine, penalty, or result which shall flow as the necessary consequence of a person exercising a Federal right.

II.

The foregoing argument has been based on the broad ground that as the right of removal is guaranteed by the Federal laws, a State can not forbid, regulate, or abridge the exercise of the right, either by prescribing conditions precedent nor by declaring what shall be the result of exercising such right.

As the statute in question is simply an ordinary legislative act and is not embodied in the Kentucky Constitution, the case may be disposed of on a narrower ground.

1. Suppose that the Constitution of Kentucky had embodied *in hæc verba* the Act of Congress of 1887–8 providing for the removal of causes; and then that the Legislature had passed an act as follows:

> "If any foreign corporation shall remove a "case to the Federal Court, its license shall be "revoked."

Would not such a statute be void because in direct violation of the State Constitution?

When the State Constitution gave the foreign corporation the right of removal, could the

Legislature abridge that right by expelling any corporation that exercised it?

Now, the Constitution of the United States and the laws passed in pursuance thereof (including the Act of 1887–8) being declared to be the "supreme law of the land," have exactly the same effect as if copied *in hæc verba* in the Kentucky Constitution. Therefore the Legislature can not prescribe a punishment or affix a penalty for exercising such a right.

2. Another illustration may be useful.

Suppose that the Constitution of the State of Kentucky provided:

> §1. That the Legislature should have absolute power to exclude foreign corporations or to admit them on such terms as it saw fit to impose; and
>
> §2. That a foreign corporation in a controversy with a local citizen should have the right to remove a case from the *nisi prius* court to the Court of Appeals, which should have original jurisdiction in such cases.

Obviously the latter section would be a qualification or limitation on the former. The proper construction would be that while the Legislature was given full power to exclude entirely foreign corporations or to prescribe the conditions of their admission, yet, if and when

admitted, they should have the privilege of removing any controversy with a citizen of the State into its Court of Appeals—the Constitution of the State conferring that right on them.

If, then, the Legislature should pass a statute which provided that foreign corporations should be admitted, but that if one should remove a case to the Court of Appeals its license would be revoked, is it not clear that such statute would be void as an attempt to nullify a right granted by the State Constitution?

It would not be any answer to say that the Constitution gave the Legislature plenary power to prescribe the terms of admission. The two sections of the State Constitution must be read together and effect given to each; the latter (§2) is a distinct exception from or limitation upon the power conferred by the former (§1); and the power conferred by the one must be so exercised as not to nullify or interfere with the provisions of the other.

No one would contend that the Legislature could, under the plea of prescribing terms of admission, destroy the very right which the State Constitution gave to a foreign corporation after it was admitted.

Now the Federal Constitution and the laws made pursuant thereto being the supreme law of the land are, in effect, a part of the Constitution of every State; and they limit the powers of the State exactly as the Constitution of a State limits the powers of its Legislature.

They present an exact parallel to the hypothetical clauses of the State Constitution above cited.

They leave to the State of Kentucky power to exclude or to admit foreign insurance corporations or to prescribe the conditions of admission; at the same time, however, they provide in express terms that such foreign corporations have the right to remove causes to the Federal Courts. That is manifestly an exception from or limitation upon the power of the State to prescribe terms. The State may admit or exclude foreign corporations and it may prescribe terms of admittance; but, if and when admitted, whatever be the condition of admittance, the foreign corporations have the right of removal.

A State, therefore, can not, under the guise of a "condition," abrogate or nullify the right of removal guaranteed by the Federal Consti-

tution. Likewise, a statute admitting foreign corporations but providing for their expulsion if they remove cases to the Federal Court, is a plain effort by the Legislature to abrogate the right of removal; it is an invasion of a power vested exclusively in the United States and not reserved to the States. Such a statute is as violative of the fundamental law of the land as would be a statute in the supposititious case above cited, which provided that a foreign corporation which removed a case to the Court of Appeals should be excluded.

The fundamental law grants the right of removal, and the implied power of the State to prescribe conditions of admittance is necessarily limited by such fundamental provision. Any effort to fritter away a right so guaranteed must be void.

It should be remembered that if a State absolutely excluded a foreign insurance company, no Federal right is infringed (for the right of removal can only arise after the company is admitted), and the company can not complain of the exclusion.

On the other hand, if a State does not care to exclude absolutely and once admits a corporation, then at that moment the State's power is curtailed and it can not hamper the right of removal by declaring that if a case is removed the company shall pay a tax or shall be expelled.

Much confusion of thought on this whole subject has arisen from the failure of courts and writers clearly to perceive the fact that while the *exclusion* of a company would not infringe any constitutional right, yet, a condition of admission or term of regulation *might* infringe it; the reason being that while the company would have no absolute right of admission, yet on the other hand, if once admitted and its right to remove arose and was exercised, any statute which prescribed any limitation on the subject was void, whether called a tax, fine, penalty, or condition.

In conclusion of this aspect of the subject, it is submitted that even if the Kentucky Legislature had the right to exclude all foreign insurance companies, the State Constitution itself (containing by implication the right of re-

moval) prohibited the Legislature from expelling a company simply because it exercised a right which a power higher than the Legislature itself had conferred.

III.

A review of the authorities will demonstrate the correctness of the foregoing argument; and while in some of the earlier cases the subject was dealt with by this court from a somewhat narrower view, it will be observed that the decisions were finally placed on the broad ground that any statute designed to entail the surrender of a privilege secured by the Constitution and laws of the United States is void, and nice distinctions between the different State statutes were disregarded and they were all held subject to the same infirmity.

In *Lafayette Ins. Co.* v. *French*, 18 How. 404 (1855), a judgment had been obtained in Ohio against an Indiana corporation, after service of process upon a resident agent, pursuant to an Ohio statute providing for such service on foreign corporations. Suit was brought in Indiana on the judgment and its validity was upheld, on the ground that the State of Ohio, in permitting foreign corporations to transact business within its limits, had the right to impose such a reasonable condition as that they should keep a resident agent upon whom process could

be served, and that by transacting business in the State the corporation impliedly assented to the condition that process be served on its agent.

The court said (p. 407):

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the constitution or laws of the United States or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others."

This court, therefore, in its very first case on the subject, decided that there *is* a limit upon the power of the State to prescribe the conditions on which a foreign corporation may transact business within its limits, to-wit: the condition prescribed must not be

> "Repugnant to the Constitution or laws of the United States."

The validity of the condition of allowing service of process on an agent was considered and was decided not to be repugnant to the Constitution or laws of the United States, and therefore the State legislation was upheld, which

ruling was reaffirmed in *Pennsylvania Ins. Co.* v. *Meyer*, 197 U. S. 407.

In *Ducat* v. *Chicago*, 10 Wall. 410 (1870), where it was said that a State might prescribe the terms or conditions on which foreign insurance companies should be admitted, and might prohibit them from doing any business until they had made a certain deposit with the State Treasurer and obtained a license, it was again observed that the power of the State to prescribe terms of admission was subject "to such limitations on her sovereignty as may be found in the fundamental law of the Union" (p. 415).

In other cases, however, certain conditions have been declared to be repugnant to the Constitution and laws of the United States, and the statutes imposing them have been held unconstitutional.

In *Insurance Co.* v. *Morse*, 20 Wall. 445 (1874), a statute of Wisconsin required foreign insurance companies, as a condition of doing business in the State, to sign a written agreement not to remove any case to the Federal Court. An insurance company made such an

agreement, and subsequently removed a case to the Federal Court.

The State court having (under that statute) refused to recognize the removal, the case was tried out in the State court. On writ of error to this Court, it reversed the judgment upon the ground that an agreement to refrain from the Federal courts was void; that the agreement under the statute was no valid reason for the State court to refuse to allow the removal; that the insurance company had the right to remove the case; and that such right could neither be denied it by statute nor could it agree in advance to waive it.

In the opinion, the Court referred to and quoted from *Paul* v. *Virginia* and other cases wherein the broad expression (now relied on by defendant in error) had been used, that as a State might exclude foreign corporations entirely, it might also impose such terms as it saw proper upon foreign corporations as conditions of transacting business. The Court said with reference to such general expressions (p. 456):

> "In each of these cases, the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms which are to

be understood only with reference to the facts in hand, . . . and *Paul* v. *Virginia* certainly had no bearing upon the right of corporations to resort to those courts or the power of the State to limit and restrict such resort.

"It was not intended to impair the force of the language used by Mr. Justice Curtis in *LaFayette Ins. Co.* v. *French*, where he says: 'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court; *provided they are not repugnant to the Constitution and laws of the United States.*' . . .

"We are not able to discover in this case any countenance for the statute of Wisconsin which we are considering.

"On this branch of the case the conclusion is this:

"1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal Court, upon compliance with the terms of the act of 1789.

"2nd. The statute of Wisconsin is an *obstruction* of this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3rd. The agreement of the insurance company derives no support from an unconstitutional statute, and is void as it would be had no such statute been passed."

The court expressly repudiated the argument that because a State could exclude a corporation entirely, it might impose any terms

it chose as conditions of admittance to or continuance within its limits.

The instant a State foregoes its right to exclude, and admits conditionally or prescribes rules to govern the corporation after admission, it is restricted in the terms it may impose to such as are not repugnant to the Constitution and Laws of the United States.

The precise point decided was that the section of the Wisconsin statute requiring (as a condition of admission) that a foreign insurance company should sign an *agreement not to remove* cases to the Federal Court was unconstitutional, and the removal could not be prevented. It did not expressly define the limits to which a State might go in prescribing terms of admission or regulations after admission; nor did it decide whether a State can revoke a license and expel a corporation because of a removal.

The next case is one which we propose to attack squarely, as unsound in principle, and to insist that it has been overruled by this court and should not now be followed.

In *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535 (1877), another section of the same Wisconsin statute provided (exactly as does

the Kentucky statute) that if a foreign insurance company removed a case to the Federal Court, the Secretary of State should immediately revoke its license.

An insurance company which was doing business in Wisconsin removed a case to the Federal Court, and the Secretary of State threatening to revoke its license, it filed a bill in the Federal Court for an injunction to prevent the revocation. This Court dismissed the bill. The grounds of its decision were substantially the arguments now advanced by defendant in error, to wit:

1. Although a State can not prevent the removal of a case to the Federal Court; yet
2. A State can exclude foreign corporations entirely, or prescribe such terms of admission as it chooses; and, therefore,
3. A State can compel a foreign corporation to abstain from the Federal Court or cease to do business in the State.
4. A bill to enjoin the revocation of the license would not lie.

After pointing out that *Insurance Co.* v. *Morse* had only declared void that section of the statute requiring a stipulation not to remove, and that the balance of the statute must now be judged on its merits; and after

referring to the cases which held that a State might impose upon a foreign corporation any terms and conditions it thought proper, that are not repugnant to the Constitution and laws of the United States, the Court (HUNT, J.) said:

> "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Rector* v. *Philadelphia*, 24 How. 300; *People* v. *Roper*, 35 N. Y. 629; *People* v. *Commissioners*, 47 N. Y. 501* . . .
>
> "A license to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States.
>
> "Full power and control over its territories, its citizens, and its business, belong to the State.
>
> "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it can not be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal Courts.
>
> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it can not be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it.

*Each of the cases cited was an instance of a State granting a tax exemption to one of its own citizens and subsequently repealing it.

"The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world. . . . If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

"In all the cases where the legislation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal. . . .

"The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State Court into the Federal Courts contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State to immediately cancel its license to do business within the State.

"If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

"It is said that we thus indirectly sanction what we condemn when presented directly; to wit: That we enable the State of Wisconsin to enforce an agreement to abstain from the Federal Courts. This is an 'inexact statement.'

"The effect of our decision in this aspect is that the State may compel the foreign company to abstain from the Federal Courts or to cease to do business in the State. It gives the company the option.

"This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact busi-

> ness there. This is the whole point of the case, and, without reference to the injustice, prejudice, or the wrong that is alleged to exist, must determine the question.
>
> "No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes."

In short, the court there held that the statute was constitutional; and that its provision that if a company removed a case to the Federal Court the Secretary of State should revoke the right to do business in the State, was *not* repugnant to the Constitution of the United States.

From that decision, BRADLEY, SWAYNE, and MILLER, JJ., dissented, saying:

> "Though a State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose *unconstitutional conditions* upon their doing so.
>
> "Total prohibition may produce suffering and may manifest a spirit of unfriendliness towards sister States; but prohibition except upon conditions derogatory to the jurisdiction and sovereignty of the United States is mischievous, and productive of hostility and disloyalty to the general government.
>
> "If a State is unwise enough to legislate the one, it has no constitutional power to legislate the other.

"The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation, or State law precluding them from this right is absolutely void—just as void as would be an agreement not to resort to the State courts for redress of wrongs or defense of unjust actions; or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions.

"The questions arising upon these Wisconsin laws have already been considered by this court in the case of *Insurance Co.* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the Federal Courts, was absolutely void. **In principle this case does not differ a particle from that.** The State legislation of 1872, under which, and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.

"The argument used, that the greater always includes the less, and therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property. . . .

"The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations—at least those of a

> commercial or financial character—should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then in large portions of the country the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction."

As the reasoning of the majority opinion in *Doyle* v. *Insurance Co.* is the sole basis of the defendant in error's argument and of the opinion of the Court of Appeals, we submit the following

CRITICISM OF THE OPINION IN DOYLE V. CONTINENTAL INSURANCE COMPANY, 94 U. S. 535.

The argument in *Doyle* v. *Insurance Co.* is this:

(1) A State has the power either to *prohibit* absolutely, or to *permit* the entrance of a foreign insurance company; in which latter event the permission is in the nature of a gratuitous license, revocable at the will of the licensor, the State;* (2) Having the power to

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*The analogy is faulty. A State does not occupy toward a foreign corporation the absolute relation of licensor to licensee. As soon as and whenever a State occupies *any* relation to a foreign corporation, at that very instant the Constitution and laws of the United States intervene and impose certain limitations on the State, and it no longer has the same rights as a licensor has over a gratuitous licensee. In short, the relations of a State to foreign corporations are determined primarily by the Constitution and laws of the United States, and not by any supposed common law analogy between a licensor and a licensee.

revoke the license (to wit, expel the company) the intention or reasons of the State in exercising such conceded power to revoke can not be inquired into; the State may exercise such power arbitrarily, for a just cause or for no cause, for a good reason or for a bad reason, and the fact that the State instead of revoking arbitrarily chooses to assign a reason for exercising its power, does not affect the validity of its power to act; and there can be no such thing as an unconstitutional reason for doing a thing which the State has the right to do; and **therefore** (3) from the foregoing argument the Court then deduces the conclusion (which we entirely dispute) that a statute is consequently valid which provides that if a company removes a case, a State officer shall revoke the license and expel it from the State.

The argument is a *non sequitur*.

The fallacy of the conclusion lies in the assumption that such a statute is the exact *equivalent* of the State exercising its conceded power of revocation; in other words, that by the statute in question, the State simply

revokes a license and assigns its reasons therefor.*

An analysis of the exact meaning of the premises will show that whatever apparent logical force the conclusion may have is merely due to the fact that the same language may have two different meanings, and that the real meaning of the premises in stating them is something different from what is attached to them when the conclusion is sought to be drawn.

We are not concerned with the motives or reasons actuating the State in passing any law; we are only interested in the question of its statutory power to enact the law; and any discussion concerning the motives actuating its exercise of a power is entirely beside the question and should not be indulged in, as it can

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*In fact the whole reasoning of the learned justice "begs the question" and "reasons in a circle," for instead of discussing squarely the question of the power to pass the statute of revocation, and deciding whether its provisions are repugnant to the Constitution, he simply *assumes* that the State has the power to revoke in the manner prescribed by the statute, and then attempts to sustain that assumption by merely proving that the State's reasons for adopting the statute can not be inquired into; and in so doing he falls into the very error he condemns, to wit, he "confounds an act with an emotion or a mental proceeding." He seeks to sustain the validity of a statute, not by vindicating its terms, but by showing that the motives actuating the State in enacting it are not subject to condemnation—a thing every one will agree to. He confuses the motives of the State in enacting the statute with the terms of the statute itself, and upholds the statute on the ground that the motives of its enactment are not subject to inquiry—a clear *non sequitur*.

only introduce confusion of ideas and can have no effect in determining the validity of a statute. It will be observed that the entire discussion in *Doyle* v. *Ins. Co.* concerning the reasons of a State in doing a particular thing relates to the motives actuating the legislature in adopting a particular statute, and does not relate to the fact of the statute itself accomplishing a given end. The validity of the *end* attained and the means employed are always subject to inquiry and review, although the *motives* actuating the adoption of the statute are not.

Let us carefully analyze the conceptions involved in the argument of the learned justice.

A. It is true that a State may, by statute, alter the rule of comity and absolutely prohibit the entrance of certain foreign corporations; in which event, the motives or reasons actuating the State are absolutely immaterial and have no bearing on the validity of the statute, even though the State was influenced to pass the statute by the apprehension that, if admitted, the company would remove a case to the Federal Court. Such a statute of exclusion would

be perfectly valid, and the reason of the State (even if recited in the preamble) would not affect the subject. The statute would not infringe any Federal right, for (1) the Constitution does not give every company an absolute right to enter, and (2) the privilege of removal would not be affected, as it could not even exist or arise until after admittance—a state of case that could never come to pass.

Similarly, a State has the right at any time to pass a statute expelling such a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the State in so doing—even though the preamble expressly recited that the license was revoked *because* the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the State any longer than it chose to allow; and the statute would not abridge any right of removal—for as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.

The foregoing is all that is really meant by the opinion in *Doyle* v. *Insurance Co.*, when it is said (94 U. S. 540–542) that a State has the right to revoke a license for any cause it sees fit, and that there can be no such thing as an unconstitutional reason, and that the motives or reasons actuating the State are not open to inquiry. With that view of the subject we have no complaint, for, properly understood, the whole discussion related exclusively to the motives and reasons in the breasts and minds of the legislators in enacting a statute, and did not touch the validity of the statute when enacted.

The mere naked exclusion, or the revocation of the license, of an insurance company, is an act that may be within the power of the State, and the reasons therefor are immaterial, but it is to be remembered that we are only considering the single question of power to exclude or revoke—for that is all the power which we concede the State has over a foreign corporation, to wit, a simple statute in such terms as this:

> The Security Mutual is hereby prohibited from entering Kentucky; or

> The license of the Security Mutual is hereby revoked.

Nothing more than the power to exclude or revoke was involved in the premise of the argument.

We now come to the conclusion sought to be deduced therefrom.

B. The Wisconsin statute in question was not a naked revocation of the license; it was not an exercise by the State of its power to revoke; it did not revoke because of the removal; it did not revoke at all.

It provided that *if* the company removed a case to the Federal Court, the Secretary of State *should revoke* its license. Now, that is a very different thing from a statute *revoking* a license.

In the one instance the State exercises its power to revoke and does so, and its reasons for revoking are negligible. In the other instance, the State, at a bound, passes beyond its power to revoke *in presenti* and undertakes to prescribe conditions *in futuro*, and to impose a penalty which shall be exacted if a company shall in the future remove a case.*

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*It is a penalty just as truly as a statute which says: "If yon kill a man, you shall be hanged."

You *may* kill your man, but *if* you do, you will be hanged: so the company *may* remove the case, but *if* so, its license will be taken away.

The idea we have in mind is the converse of and analogous to that of Mr. Justice Blatchford in *Barron* v. *Burnside*, 121 U. S. 186, 198, when, in speaking of an agreement by a company not to remove cases, he said:

> "While the right to remove a suit might be waived, or its exercise omitted, in each recurring case, a party could not bind himself in advance, by an agreement which might be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case might be presented."

So while a State may, in each recurring case, exercise its power to expel a corporation for any reason it sees fit, the State can not bind itself or provide in advance by statute, which is either self-executing or will be specifically enforced, to expel corporations at all times and on all occasions whenever the case might be presented.

Certainly an individual has as absolute power to refrain from removing a case as the State has to expel a corporation, and yet in neither case is an agreement for the future the same as its present exercise.

Of course a State may lawfully impose certain conditions or penalties on foreign insurance companies, and all we mean here is to point out that the particular argument advanced in *Doyle*

v. *Insurance Co.* was illogical, as its conclusion did not necessarily follow from the conceded premise. In short, because a State can revoke, it does not follow that it can provide as a future rule of conduct that *if* a case is removed the penalty of revocation shall follow; for in that event it is no longer the exercise of the power of revocation, but is the imposition of conditions for a continuance within the State's limits.

Those conditions must be judged on their merits, and it must be determined whether, *as such*, they are or are not repugnant to the Federal laws.

If the reasoning in the *Doyle* case be sound, to wit, that there is no limit to the terms which a State may impose as a condition of allowing foreign corporations to enter or to continue within its limits, then the repeated declarations of this court that the conditions must not be repugnant to the Federal laws, become a mere *brutum fulmen*—without force or significance.

There has never been a careful criticism of the arguments in *Doyle* v. *Insurance Co.*, and the foregoing review may assist in pointing out the unsoundness of its reasoning.

The next time (ten years later) the question was presented to this Court it decided differently, declared an exactly similar statute to be unconstitutional, adopted the reasoning of the dissenting judges in the *Doyle* case, overruled all its reasoning, and again restored uniformity in its decisions.

In *Barron* v. *Burnside*, 121 U. S. 186 (1887), an Iowa statute provided:

§§1, 2. That before a foreign corporation could transact business in the State, it must file a copy of its charter, authorize service of process on its agents, and make a written application for a permit or license, which application should contain a stipulation that the permit should be subject to each provision of the statute.*

§3. That if a foreign corporation removed a case to the Federal Court, its permit or license should be revoked.

§4. That a penalty should be inflicted upon any foreign corporation and its agents doing business without a permit or license.

A foreign railroad company failing to take out a permit, one of its engineers was arrested

*It is important to observe that the statute does not even require an agreement not to remove (and in that it differs from the statute in *Insurance Co.* v. *Morse*); it only provides that *if* a case is removed, the permit shall be forfeited. The stipulation that the permit should be subject to the terms of the act was nothing more than an agreement that the company would conform to the statute, which indeed is implied on entering a State. Such a stipulation adds nothing to the act.

for running a train without a permit. On a writ of *habeas corpus*, this Court discharged him on the ground that the statute requiring the permit was void, as it made the right to a permit dependent upon the surrender of a privilege secured by the Constitution and laws of the United States.

The Court disregarded the fine distinction drawn in *Doyle* v. *Insurance Company* that there was a substantial difference between a statute requiring an agreement not to remove and one providing for a revocation of a license if a case was removed; and held, in effect, that in either instance the statute was void, because it was an "obstruction" to a right granted under the Federal Constitution. In short, the court followed the reasoning of the dissenting opinion in the *Doyle* case, where Mr. Justice Bradley had said that, in principle, the statutes did not differ a particle and one was as void as the other.

The Court did not decide that the Iowa statute was *in terms* the same as that section of the Wisconsin statute involved in *Insurance Co.* v. *Morse* (for on the contrary it was similar to the section involved in *Doyle* v. *Insurance Co.*), but it decided that it fell within the

principles announced in *Insurance Co.* v. *Morse*, and in effect overruled the *Doyle* case.

The Court said (p. 197):

> "It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in §3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the State Court into the Federal Court, either on the ground of diversity of citizenship or of local prejudice.
>
> "The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation with the Secretary of State, of a copy of its articles of incorporation and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which in this statute the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal Court. In view of these considerations the case falls directly within the decision of this court in *Home Insurance Co.* v. *Morse*, 20 Wall. 445."

This court then carefully reviews *Insurance Co.* v. *Morse* and *Doyle* v. *Insurance Co.* It distinctly approves the *Morse* case, its judgment and reasoning, and expressly removes the limitation which had been placed on it in the *Doyle* case; it recognizes the inconsistency be-

tween the reasoning of the court in the two cases, and then deliberately accepts the reasoning in the *Morse* case and rejects that in the *Doyle* case, saying (p. 199):

> "The point of the decision (in *Doyle* v. *Insurance Co.*) *seems* to have been that as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. **All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."**

Every sentence from the opinion in the *Doyle* case, including that which declares that a State "may compel the foreign corporation to abstain from the Federal Courts, or to cease to do business in the State" is clearly *withdrawn*.

The court then concluded (p. 199):

> "In both of the cases referred to (*Morse* and *Doyle*), the foreign corporation had made the agreement not to remove into the Federal Court suits to be brought against it in the State Court.
>
> "In the present case, no such agreement had been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal Court suits brought against it in the State Court, as a condition of obtaining a

permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal Court, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits.

"As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.

"In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States."

The statute in *Barron* v. *Burnside* was different from that in *Ins. Co.* v. *Morse*, and yet the same result was reached. In *Ins. Co.* v. *Morse*, the statute required that the foreign corporation should affirmatively agree not to remove a case. In *Barron* v. *Burnside* the statute did not require any express agreement by the corporation not to remove cases to the Federal Court, but merely provided (as does the Kentucky statute) that if a case was removed, the right to do business was revoked. Yet, in each case, this Court held the statute void.

The decision in *Barron* v. *Burnside* is conclusive of the case at bar. The Iowa and Kentucky statutes are similar, and the same reasoning that condemns one must condemn the other.

It must be noticed that, even if what is said in *Barron* v. *Burnside* to be the point of the *Doyle* case is to considered as established law, to-wit, "that as the State had granted the license, its officers would not be restrained by injunction by a *Court of the United States* from withdrawing it," the *Doyle* case has no application to the facts in this case.

Plaintiff in error does not ask, and never has asked, an injunction from a Court of the United States to the officers of a State, from revoking a license.

This action was commenced in the State Court of Kentucky, and the court of first instance granted such an injunction.

The successful result of this writ of error, while it would reverse the judgment of the Kentucky Court of Appeals, would not grant plaintiff in error an injuction. The result would be the reinstatement of the original decree which contains injunctive relief.

The *Doyle* case, so far as its doctrine interferes with our contentions, has already been overruled and destroyed by the case of *Barron* v. *Burnside*.

We are not asking this Court to overrule the *Doyle* case; we are only asking it to sustain itself, and to reaffirm the principles of *Barron* v. *Burnside*.

In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202 (1892), the plaintiff sued the Southern Pacific Co. in the Western District of Texas, which was not the residence of either party.* The plaintiff, however, contended that the defendant had waived its right to insist on the suit being brought in the residence of the plaintiff or defendant, and had consented to be sued anywhere in the State, by virtue of having filed with the Secretary of State (as a condition of being admitted to the State) a resolution of its Board of Directors authorizing service upon any of its agents. The Texas statute provided (exactly as the Iowa statute) that the corporation should apply for a permit, and that the application should contain a

*Under the Act of Congress of March 3, 1887, the suit must (unless waived by the party) be in the district of the residence of plaintiff or defendant, and the Western District was neither.

stipulation that the permit, when issued, should be subject to all the provisions of the act, one of which was that if a corporation removed a case, the permit should become void.

The court denounced the statute as a **"vain attempt to prevent removals into the National courts,"** and said (p. 207):

> "The statute requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Texas, 556."

The "removal" feature alone was sufficient to vitiate even the provision authorizing service on an agent. Although the statute did not require an express agreement in advance not to remove, yet this court treated the provision (that if it removed a case, its right to do business should be revoked) as equivalent to requiring a surrender of a constitutional privilege.*

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*It will be observed that the court in both *Barron* v. *Burnside* and *Southern Pacific* v. *Denton* says the statute in question was an attempt to "prevent" removals and required a "stipulation not to remove" or a "surrender" of a privilege. That was not technically what the statutes provided, but it was their substantial effect, and this court so treated it.

See also *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111, and *Blake* v. *McClung*, 172 U. S. 255, 256, in which latter case it is also said:

> "Although generally speaking the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business, such a power can not be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

The only decisions of any other court to which we will refer, are two of the Court of Appeals of Kentucky, rendered in 1895, wherein another Kentucky statute (§572), substantially similar to the one now in question, was declared unconstitutional.

The Kentucky Legislature, in dealing with "Corporations," passed two statutes designed to deter removals to the Federal Court. One statute (§572, R. 4; p. 3, *supra*) related to all foreign corporations (including insurance companies), and provided that if a corporation removed a case, it forfeited its right to do business thereafter; the other statute (§631)

related only to insurance companies, and provided that if one removed a case its right to do business should be revoked (R. 22).

The statutes are substantially the same; in one instance the removal, *ipso facto*, forfeits the right to do business, and in the other it becomes the duty of the Insurance Commissioner to revoke its authority. Indeed the second statute (§631) is merely auxiliary to the first; for if an insurance company removes a case, its authority to transact business is, under §572, *ipso facto* forfeited; and §631 merely directs that, in addition, the Commissioner shall revoke all agents' licenses and publish the fact in the papers. (Opinion of BARKER, J., R. 22.)

Ky. Statutes, Sec. 572 (omitting immaterial parts), provides as follows (R. 4):

> "If any foreign corporation shall remove to a Federal Court any action pending against it in any court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation (which) shall thereafter transact any business in this State shall be fined not less than $500 or more than $1,000."

It will be observed that the statute provides for (1) a forfeiture of the right further to

do business in the State; and (2) a penalty for doing business thereafter.

Both aspects of the statute were before the Court of Appeals, and were held to be unconstitutional.

In *Commonwealth* v. *East Tennessee Coal Co.*, 97 Ky. 238 (1895), the Coal Company removed a case to the Federal Court, and thereupon the Commonwealth filed a suit in equity to enjoin it from further continuing its business in Kentucky.* The question was thus squarely presented whether the State had the power to provide by statute that if a foreign corporation removed a case it should no longer transact business in this State.

It was there argued, as it is here, that the State had the right to exclude the Coal Company entirely, and therefore could impose such conditions as it chose on its right to enter and continue in the State; but the Court of Appeals, in an elaborate opinion by Judge EASTIN, reviewed all of the authorities, and held that

*As said in the dissenting opinion in the case at bar (Rec. 24): "It was nothing more or less than a proceeding to revoke the license or right to do business in Kentucky of a foreign corporation, for the sole reason that it had exercised its privilege of removing an action to the Federal Court. In principle, the questions involved there and here are identical."

§572 was unconstitutional and that the State could not impose such a condition on the right of a corporation to do business in its limits.

The court said:

> "It is manifest that the effect, as well as the *purpose*, of the statute in question, is to *prevent the removal* to a Federal Court by any foreign corporation doing business in this State, of any action brought against it in any court of this State. By the terms of the statute, the mere removal of the cause, without the consent of the adverse party, is made to operate as a forfeiture of all right on part of the corporation to transact any further business in this State, and it is thereby in effect excluded from doing business in this State. . . .
>
> "Had the Legislature of this State the constitutional power to pass the act in question, and can the courts of this State legally enforce the provisions of this act, which denies to foreign corporations the right to do business in this State unless they surrender the privilege thus guaranteed to them under the Constitution and laws of the United States?
>
> "For the affirmative of this proposition, it is contended that each State has the right to prescribe the terms and conditions upon which the corporations of other States may carry on business within its borders; that a corporation has no right, except by permission, to carry on business at all in any State except that of its incorporation; that it is within the power of the several States to exclude from their limits all foreign corporations, and to deny them the privilege of doing business within their boundaries; and that this being the case, the corporation going into a foreign State to carry on business must do so subject to any and all restrictions, limitations, and

conditions which that State may see fit to put upon it.

"We admit the force of this reasoning, and if no authorities were furnished us, or if the question were before us as an original one, we might be inclined to give it more consideration than now seems necessary.

"But it appears that the Supreme Court of the United States has several times been called upon to pass upon cases involving similar questions; and that, while recognizing the general doctrine that a State has the power to exclude foreign corporations from its limits, or to prescribe terms on which they may do business within its territory; yet that tribunal has fixed a limit beyond which the State may not go in the exercise of this power, and that limit seems to be, that it shall not prescribe terms, the effect of which will be to deprive the corporation of a right guaranteed to it by the Constitution or the laws of the United States."

The court then reviews at length the cases of *LaFayette Ins. Co.* v. *French*, 18 How. 407; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Barron* v. *Burnside*, 121 U. S. 199; *Southern Pacific Co.* v. *Denton*, 146 U. S. 207, and *Martin* v. *B. & O. R. Co.*, 151 U. S. 684, and points out that they decide that any statute which provides that if a corporation removes a case its right to do business is forfeited, is void as an attempted deprivation of a right guaranteed by the Constitution and laws of the United States.

The court thus concludes its opinion:

> "From this review of the decisions of the Supreme Court of the United States, it would seem that *there is no longer any question* as to the *invalidity* of legislation, such as this act we are now considering.
>
> "Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the Constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on the part of the State by which it is proposed or designed to take away that privilege, even under the power of the State to fix the terms upon which the corporation may enter that State for the purpose of doing business, is unconstitutional and void.
>
> "In accordance with these views we adjudge that Section 572 of the Kentucky Statutes is *unconstitutional*, and that the demurrer of appellee to the petition filed against it by appellant was properly sustained."

It is to be observed that in that case the court took the firm position that the "purpose" of the statute was to prevent removals to the Federal Court, and that any act is unconstitutional which

> "denies to foreign corporations the right to do business in this State, unless they surrender the privilege guaranteed to them under the Constitution and laws of the United States."

It is therefore most surprising that, in the opinion of the Court of Appeals in the case at

bar, the above case should be thus disposed of by Hobson, J. (R. 20):

> "The case of *Commonwealth* v. *East Tennessee Coal Co.*, 97 Ky. 238, did not involve the revocation of a license granted by the State, but was in effect similar to *Barron* v. *Burnside*, above cited, being a proceeding to impose a *fine* on the defendant after it removed a case from the State Courts."

That shows that the learned judge did not read the case, and the comment of the dissenting opinion of Barker, J., is pertinent (R. 25):

> "I deeply regret that an opinion showing such painstaking labor and learning as does that in *Commonwealth* v. *East Tennessee Coal Co.* should receive no better fate at the hands of the court, as at present constituted, than to be silently ignored, or, worse still, should only have been thought worthy of a casual line which wholly misstates the question involved."

In *Commonwealth* v. *Jellico Coal Co.*, 97 Ky. 246, the other branch of §572 was under consideration. The Jellico Co. removed a case to the Federal Court and continued to do business thereafter; and the Commonwealth sued to recover the penalty of $1,000 provided in the statute. It was held that as the statute was unconstitutional (because of the prohibi-

tion to transact business if a corporation removed a case, as already decided in *Commonwealth* v. *East Tennessee Co.*, 97 Ky. 238) the penalty could not be recovered.

It is to be especially observed that §572 was held unconstitutional, *not* because of the clause which imposed a fine for continuing to do business after the removal, but because of the clause which declared that if a corporation removed a case its right to do business should be forfeited.

Of course the *fine* imposed for continuing to do business was not the vitiating part of the statute, for the State had a perfect right to impose a fine for transacting business, *provided it first had the right to prohibit the transaction of the business itself.*

The validity of the fine followed and depended upon the primary question, to wit: Did the State have the right to expel the corporation because it had removed a case to the Federal Court?

The Court held that "even under the power of the State to fix the terms upon which the corporation may enter the State for the purpose of doing business," the State could not

enforce a statute whose manifest purpose was "to prevent the removal to a Federal Court," and for that reason §572 was void.

Attention is directed to the precise ground on which §572 was declared void, because of the fact that the present Court of Appeals, as pointed out above, got the cases confused, and entirely misstated its previous decision on the subject (R. 20).

We have, therefore, an elaborate and well-considered opinion of the former court, holding, in 1895, that §572 is unconstitutional, because it "denies to foreign corporations the right to do business in the State unless they surrender the privilege (of removal) guaranteed to them under the Constitution and laws of the United States."

The present case in effect overrules it, although the Court of Appeals apparently shrunk from saying so in terms, as that would result in driving all other corporations out of the State if they should remove cases (which is a daily occurrence), and so the effort is made to single out *insurance* companies alone and say that if they remove cases, they must get out of the State.

The inconsistency is obvious.

It is perfectly plain that §631 is unconstitutional, for precisely the same reasons as §572; the statutes are the same, as each provides that *if* a case is removed the corporation shall no longer be permitted to do business in this State.

Under §572, a foreign corporation that removed a case to the Federal Court *ipso facto* forfeited its right to continue to do business in this State, and was liable to a fine if it continued to do business thereafter. That statute is void.

Under §631, if a foreign insurance company removes a case, the Insurance Commissioner *must* forthwith revoke its license and institute proceedings to prevent its further transaction of business. What is the difference? None.

If a coal company can not be prohibited from transacting its business because it had removed a case to the Federal Court, how can an insurance company be prohibited from transacting its business when it has done exactly the same thing?

It is obvious, therefore, that if the State of Kentucky had (pursuant to §572) filed a bill

against the Security Mutual seeking to enjoin it from transacting its business, the bill would have been dismissed, just as it was in the case of the coal company, because the insurance company was entitled to continue its business, and the prohibitory statute was void.

If the State of Kentucky could not by a direct proceeding revoke the authority of the insurance company to do business in this State, how can an Insurance Commissioner revoke the authority?

There is no legal way in which an argument can be framed that will allow the coal company to do business and exclude the insurance company, when each has done the same thing.

Surely there is not one rule for coal companies and another for insurance companies, so far as the effect of an unconstitutional act is concerned.

Each of the sections (§572 and §631) under consideration provides that if the corporation removes a case to the Federal Court, the same result shall follow, to wit, a withdrawal of the State's consent to their further transaction of business within its limits. In the one case (§572) the removal *ipso facto* acts as a with-

drawal of the State's permit, while in the other (§631) the removal *ipso facto* makes it the "duty" of the Commissioner to "forthwith revoke all authority" to do business. The effect is precisely the same.

Suppose the Insurance Co., appellee, should, in defiance of the revocation of its license, proceed to do business in the State, and the Commonwealth, or the Insurance Commissioner, should institute proceedings to punish it for doing business without a license, would not such proceedings inevitably fail? If the Coal Co. could not be either enjoined from doing business or fined for doing it, could an insurance company be enjoined or fined?

If, therefore, the Insurance Co. is entitled to do business in Kentucky, in spite of having removed a case to the Federal Court, can that right be frittered away by allowing the Commissioner to expel it? What the Commonwealth of Kentucky could not accomplish by a suit brought directly for that purpose, can not be indirectly accomplished by a subordinate State officer.

If the Insurance Co. has the right to do business in this State, the Insurance Commissioner must be enjoined from prohibiting it.

If, when the Commonwealth of Kentucky passed a statute (§572) providing that upon the removal of a case to the Federal Court the right of the corporation to transact business shall be forfeited, such statute is void, because its purpose is to prevent removals, can it possibly be said that a mere Insurance Commissioner has greater power than the State of Kentucky? If the purpose of the statute to prevent removals is sufficient to nullify it, is not the revocation of the Commissioner for the same purpose clearly void and futile? Surely a Commissioner of Insurance will not be allowed to do what the State can not do.

As a result of all the authorities on the subject, we submit:

First. A foreign insurance company has the right to remove cases to the Federal Court, and that right is secured by the Constitution and laws of the United States, and is superior to any common law right reserved to the States to exclude or expel corporations.

Second. Every State, in exercising its right of control over foreign corporations, is limited by the privilege of removal.

Third. A State can not impose on foreign corporations terms or conditions of admission or continuance that are repugnant to the Federal laws.

Fourth. Any condition which in any way denies, forbids, prevents, obstructs, or abridges a Federal right, is unconstitutional; and the abridgment may be either as a condition precedent to admission or as a condition subsequent.

Fifth. A State statute which provides for a certain result to follow the exercise of a Federal right, is void. In short, a State can not lay a burden on the exercise of such right; and especially a mere State Legislature can not do so, as it is abridging a right conferred by its own State Constitution, as well as a Federal right.

Sixth. A statute providing that if a corporation removes a case, its authority to continue in the State shall cease and be taken

from it, is void because it imposes a penalty, term, condition (or whatever other expression by which you choose to designate it) upon the exercise of a Federal right.

The rule on the subject may be thus formally expressed:

Although a State may exclude a foreign insurance corporation entirely, yet if it undertakes to prescribe conditions on which it may enter, the State can not

(1) Make as a condition of its admittance that it will agree not to remove a case to the Federal Court; nor
(2) Make as a condition of permitting it to remain in the State that it will abstain from removing cases to the Federal Court.

In short, a State can not make the right to continue within its limits dependent upon the surrender or abandonment of, or abstention from, the right of removal to the Federal Court.

From that it follows that the Kentucky Statute is unconstitutional.

IV.

Disregarding the repudiation of *Doyle* v. *Insurance* by Mr. Justice BLATCHFORD in *Barron* v. *Burnside*, the Court of Appeals of Kentucky, in its opinion, said that the *Doyle* case rested on sound principles; that *Barron* v. *Burnside* did not overrule or conflict with it in any way; and therefore it followed the *Doyle* case and decided the case at bar upon its authority (R. 19, 20).

A.

In order to reach that conclusion (which the dissenting judge characterized as "not only contrary to authority but also to reason"), the Court of Appeals attempted to find a distinction between the statutes involved in the two cases—a distinction that does not exist.

It said (1) that in the *Doyle* case, the statute simply provided that if a foreign corporation removed a case, the Secretary of State should revoke its license, while (2) on the other hand, the statute in *Barron* v. *Burnside* was like that in *Insurance Co.* v. *Morse*, which required the

company to sign an agreement not to remove a case to the Federal Courts.

It was then argued that it was the requirement of an express agreement in advance not to remove cases to the Federal Courts that vitiated the statute in the *Morse* and *Barron* cases; but that as there was no such requirement in the *Doyle* case or in the Kentucky statute, the case at bar was distinguishable from *Barron* v. *Burnside*, and fell directly within the *Doyle* case, Judge Hobson saying (R. 19):

> "Our statute is not liable to the objections made to the statute in either the *Morse* case or the *Barron* case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal Court whenever it sees proper.* It is required to sign no stipulation or agreement interfering with that right."

Neither did the Iowa statute in *Barron* v. *Burnside*, and the learned judge simply erred.

There is no real distinction between the statutes of Wisconsin, Iowa, Texas, and Kentucky on this subject.

The statutes are copied in full in the opinions of this court, but instead of reading the

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*The learned judge also overlooked the fact that the title to §572 is "Action—removal to or institution in Federal Court *forbidden—penalty*" and the title to §631 is substantially the same.

statutes themselves, the Court of Appeals, misinterpreting an expression of this court, relied on such expression as establishing a difference.

Let us see exactly what the respective statutes were:

THE WISCONSIN STATUTE.

It contained two provisions:

1. That the foreign corporation should, before entering the State, sign an agreement not to remove.

2. That if a company removed a case, the Secretary of State should revoke its license.

The first of those provisions was held void in *Insurance Co.* v. *Morse;* the second was sustained in the *Doyle* case.

THE IOWA STATUTE.

It was adopted after the decisions in the *Morse* and *Doyle* cases, and doubtless was intended to "square" with them, as it omitted the section that was held void in the *Morse* case and simply provided that if a foreign company removed a case, its license should be forfeited.

That is the exact equivalent of so much of the section of the Wisconsin statute as was involved in the *Doyle* case.

Statutes of Wisconsin, Iowa, Tex

WISCONSIN. (Insurance Co. v. Morse, 20 Wall. 445; Doyle v. Insurance Co., 94 U. S. 535, 536-7.)		IOWA. (Barron v. Burnside, 121 U. S. 186.)	
[1] Any foreign fire insurance company desiring to transact insurance business in this State "shall first appoint an attorney in this State on whom process of law can be served, *containing an agreement that such company will not remove the suit for trial into the U. S. Circuit Court or Federal Courts.*"	If it stood alone, the provision for service of process on an agent would be valid (*Lafayette Ins. Co. v. French*, 18 How. 404). The italicized words were held to be unconstitutional in *Insurance Co. v. Morse*, 20 Wall. 445, 458.	[1] Any foreign corporation desiring to transact its business in this State shall file a copy of its charter and a resolution of its Board of Directors, authorizing service of process to be made upon any of its officers or agents, and "requesting the issuance to such corporation of a permit to transact business in this State. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act."	If it stood alone would probably be *ette Ins. Co. v.* (per *Blatchford, Burnside*, 121 was held void ing section.
[2] If any insurance company shall "remove any suit . . . to the Federal Court . . . it shall be the imperative duty of the Secretary of State, or other proper State officer, to revoke and recall any authority or license to such company to do and transact any business in the State of Wisconsin."	This section was held to be constitutional in *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 539, 542.	[2] "Any foreign corporation . . . who shall remove any such cause from such State Court into any of the Federal Courts . . . shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact business in this State."	This section stitutional in U. S. 186, 200.
[3] If any insurance company shall remove a case to the Federal Court, contrary to its above agreement not to remove, it shall be liable to a penalty for each removal so made of from $100 to $500, to be recovered by suit of the State of Wisconsin.	This section has not been specifically passed upon.	[3] "Any foreign corporation that shall carry on its business . . . without having complied with this statute and taken out and having a valid permit shall forfeit $100 . . . and any agent who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein, shall be guilty of a misdemeanor," and fined not over $100 or imprisoned not over 30 days.	This section stitutional in U. S. 186, 200.

The above schedule shows very clearly (1) that the Wisconsin statute expressly required an agreement r required an agreement not to remove; (3) that there is no real distinction between the statutes involved in Do

COMPARATIVE SCHEDULE

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va, Texas, and Kentucky, whose Purpose is to Prevent Removals to the Federal Courts.

186.)	TEXAS. (Southern Pacific v. Denton, 146 U. S. 202, 206.)		KENTUCKY. (Ky. Stat., Sections 572, 631; Com. v. East Tennessee Coal Co., 97 Ky. 238; Com. v. Jellico Coal Co., 97 Ky. 246; Security Mutual, 26 Ky. Law Rep. 1239.)		
If it stood alone, these requirements would probably be valid under *Lafayette Ins. Co. v. French*, 18 How. 404 (per *Blatchford*, J., in *Barron* v. *Burnside*, 121 U. S. 186, 197); but it was held void because of the succeeding section.	[1] A foreign corporation desiring to transact business in the State shall file a copy of its charter and a resolution of its Board of Directors "authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act."	This section was held to be void in *Southern Pacific* v. *Denton*, 146 U. S. 202, 207, because of the succeeding section.			(*Ky. Stat.* §631.) "Before authority is granted to ance company to do business in this with the Commissioner a resoluti that service of process upon any ag valid service."
This section was held to be unconstitutional in *Barron* v. *Burnside*, 121 U. S. 186, 200.	[2] Any foreign corporation which shall remove a case to the Federal Court "shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this State."	This section was held to be unconstitutional in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207.	(*Ky. Stat.* §572.) "If any foreign corporation shall . . . remove to a Federal Court any action . . . such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State"; and	This clause was held unconstitutional in *Com.* v. *East Tenn. Coal Co.*, 97 Ky. 238.	(*Ky. Stat.* §631.) If any company shall remove a Court, "it shall be the duty of the forthwith revoke all authority to its agents to do business in this Sta
This section was held to be unconstitutional in *Barron* v. *Burnside*, 121 U. S. 186, 200.			(*Ky. Stat.* §572.) "Such corporation and any officer, agen or employe thereof who shall thereafter transact or engage in any business or employment for such corporation in this State, shall be severally guilty of a misdemeanor," and fined for each offense from $500 to $1,000.	This clause was held unconstitutional in *Com.* v. *Jellico Coal Co.*, 97 Ky. 246.	(*Ky. Stat.* §633.) Any agent acting without a li license has been revoked, shall be meanor and fined from $50 to $100

greement not to remove, which was held void in the Morse case, while the balance of the statute was held valid in the Doyle case; (2) that neither the Iowa, Texas, nor Kentucky st ved in Doyle v. Ins. Co., Barron v. Burnside, and Sou. Pacific v. Denton, and the Kentucky Statutes §572, 631.

IPARATIVE SCHEDULE

OF THE

and Kentucky, whose Purpose is to Prevent Removals to the Federal Courts.

	TEXAS. (Southern Pacific v. Denton, 146 U. S. 202, 206.)		KENTUCKY. (Ky. Stat., Sections 572, 631; Com. v. East Tennessee Coal Co., 97 Ky. 238; Com. v. Jellico Coal Co., 97 Ky. 246; Prewitt v. Security Mutual, 26 Ky. Law Rep. 1239.)		
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l to be uncon- *Burnside*, 121	[2] Any foreign corporation which shall remove a case to the Federal Court "shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this State."	This section was held to be unconstitutional in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207.	(*Ky. Stat.* §572.) "If any foreign corporation shall . . . remove to a Federal Court any action . . . such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State"; and	This clause was held unconstitutional in *Com.* v. *East Tenn. Coal Co.*, 97 Ky. 238.	(*Ky. Stat.* §631.) If any company shall remove a suit to a Federal Court, "it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State."
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o remove, which was held void in the Morse case, while the balance of the statute was held valid in the Doyle case; (2) that neither the Iowa, Texas, nor Kentucky statutes v. Ins. Co., Barron v. Burnside, and Sou. Pacific v. Denton, and the Kentucky Statutes §572, 631.

THE TEXAS STATUTE.

The statute involved in *Southern Pacific* v. *Denton*, 146 U. S. 202, is the same as the Iowa statute.

THE KENTUCKY STATUTE.

It is almost identical with the Iowa and Texas statutes, except that it does not require the application for a license to be in writing; it may be verbal.

The terms of the various statutes may be grasped in a moment by the schedule on the opposite page.

The explanation for the Court of Appeals making such a mistake is probably this: In *Barron* v. *Burnside* and *Southern Pacific* v. *Denton*, this Court disregarded the fine distinction drawn in the *Doyle* case and reverted to the principles laid down in the *Morse* case; and after quoting the statutes verbatim, this Court, in the argumentative part of its opinions, simply referred to the Iowa and Texas statutes respectively as requiring a "stipulation not to remove" (121 U. S. 197) and "to surrender a right and privilege" (146 U. S. 207), but

it was only referring to the substantial effect of the statutes, and not attempting to quote their terms literally.

When this Court speaks of the State statute as requiring "a surrender of a privilege," it does not mean an express agreement in advance not to remove, but only refers to the substantial effect of the statute in making the right to do business dependent upon abstaining from the Federal Courts, which is of course a surrender of a right as effectually as if it had expressly agreed in advance not to remove.*

In speaking of these various State statutes, this Court refers to every one of them as requiring the foreign corporations *to stipulate not to remove* cases to the Federal Court; that is to say, in stating the effect of the statutes, no distinction is drawn between those statutes which require foreign corporations to sign an agreement that they will not remove cases, and those statutes which merely provide that *if* a foreign corporation removes a case, its right to do business shall be revoked. It holds

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*So in the *East Tennessee Coal Co.* case (97 Ky. 241) the Court of Appeals used the same form of expression when it said that Kentucky Statutes, §572, required the company to "surrender the privilege thus guaranteed to them under the Constitution," etc.

that in whichever form the statute is drafted, it is equivalent to requiring the foreign corporation to stipulate not to remove a case to the Federal Court.

This fact should be borne in mind, as it explains the declaration of this Court that the statute was void because it required a stipulation not to remove—whereas the statute may have been, strictly speaking, as to form only. that if a case was removed the license should be revoked.

Really, however, the point is immaterial, for even if the Iowa statute had expressly required the company to agree in advance not to remove (as the Court of Appeals says it did) then it would have been exactly like the Wisconsin statute as it originally stood; and under the authority of the *Morse* case such provision would have been void just as was the like provision of the Wisconsin statute, and we would then have the ***remaining*** parts of the Wisconsin and Iowa statutes exactly alike—for an unconstitutional section has no effect, and is exactly as though it had never been enacted.

We thus see that there is no ground for distinguishing *Barron* v. *Burnside* from *Doyle* v. *Insurance Co.*, because (1) the Iowa statute never at any time required an agreement not to remove, and (2) even if it did, the decision of *Barron* v. *Burnside* did not rest on it (for it was concededly void under the *Morse* case), but on the other provision that if a case was removed the license should be revoked—which was the exact provision in the *Doyle* case.

B.

After the full review of *Doyle* v. *Insurance Co.* (p. 44 *et seq., supra*) and *Barron* v. *Burnside* (p. 59 *et seq., supra*), it seems almost superfluous again to point out that the latter overruled the former, but in view of the opinion of the Court of Appeals and of Justice Peckham's language in *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 307* (1903), it may be further observed:

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*In *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288, a suit was brought at law in a State court on an insurance policy. The defendant, subsequently, brought suit in equity in the Federal Court seeking to have the policy canceled on the ground of fraud, and sought to invoke equitable jurisdiction upon the far-fetched ground that it could not avail itself adequately at law of its defense of fraud, because if it removed the law case to the Federal Court its license would be revoked. It was properly held that there was no ground for equitable jurisdiction, as the defense could be pleaded at law, and the mere fact that its license would be revoked on removing the case did not afford any ground for equitable jurisdiction in a suit on a policy. In short, the validity of the Illinois statute against removals was not involved in the suit, for whether void or valid the result would be the same—no equity jurisdiction to supersede an existing suit at law, in which the defense of fraud could be fully availed of. Therefore this court refused to go into the question of the validity of the statute of Illinois or of the present value of the *Doyle* case, saying:

> "Whether this case (*Doyle* v. *Insurance Co.*) has been shaken by the subsequent cases of *Barron* v. *Burnside*, 121 U. S. 186–199, *Blake* v. *McClung*, 172 U. S. 239–254, and *Dayton Coal Co.* v. *Barton*, 183 U. S. 85, it is not here material to discuss. . . . Whether as a result of such removal the State would have the right by reason of the statute to revoke the license given to the company is not a question which it is necessary for us to here discuss or determine."

It is, however, to be observed that the court reiterated the doctrine that the State could impose no conditions repugnant to the Constitution or laws of the United States (page 307). In short, the decision was placed on the ground that as the Federal Court had no jurisdiction in equity, such jurisdiction could not be conferred by the mere fact that the Insurance Company might by its own act in removing the case at law be subject to a litigation or annoyance. (Page 308.)

In *Doyle* v. *Insurance Co.* this Court held a statute (providing that if a company removed a case the Secretary of State should revoke its license) to be valid.

In *Barron* v. *Burnside* it held a statute (providing that if a company removed a case its permit should be forfeited) to be void.

Those cases are irreconcilable.

In *Barron* v. *Burnside*, as reviewed above (p. 59 *et seq.*, *supra*), it was held that there were limitations on the power of a State to prescribe the conditions governing the admission of foreign corporations; that the purpose of the statute was to deprive a foreign corporation of the right of removal; that the State could not impose such a condition; that the statute was void; and that a person violating it could not be punished. This Court reviewed the facts in *Doyle* v. *Ins. Co.*, and said:

> "The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as *not in judgment.*"

Not only did the decision in *Barron* v. *Burnside* not follow the reasoning in the *Doyle* case, but it reached an exactly opposite conclusion as to the validity of substantially the same statute, and the above quotation shows that it was in effect repudiated in so far as its reasoning went.

This Court did not analyze or criticise in detail the reasoning in the *Doyle* case, but contented itself with saying that the point of the decision "*seems*" (which was a polite way of suggesting that it is difficult to see just exactly what the case did decide) to have been that as the State granted the license, a Federal Court would not enjoin its revocation. As *Barron* v. *Burnside* did not involve a question of injunction, this court simply limited what was decided in *Doyle* v. *Insurance Co.* to the bare fact that a Federal Court would not enjoin a State officer from revoking the license granted by the State, and did not even approve that—but simply stated that that was all there was in *Doyle* v. *Ins. Co.* anyway, withdrew everything beyond that, and let it stand at that. The court then went on to repudiate all the reasoning in *Doyle* v. *Ins. Co.* by saying:

> "All there is in the case beyond this must be regarded as not in judgment,"

which was a clear repudiation of the statement in the *Doyle* case that "the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State"; and the repudiation was further emphasized by the following expression:

> "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The best possible proof that *Barron* v. *Burnside* overruled the *Doyle* case is found in the fact that the statutes in the two cases are identical (except slight verbal differences), and in the *Doyle* case the statute was held valid, while in *Barron* v. *Burnside* the same statute was held void.

If it intended to adhere to the doctrine of the *Doyle* case that a State might compel a foreign corporation to abstain from the Federal Courts or cease to do business in the State, it is perfectly clear that such a principle applied to the facts in *Barron* v. *Burnside* would have sus-

tained the arrest of the engineer; for according to the *Doyle* case, the State had a right to say to the Railroad Co. in Iowa, "You must abstain from the Federal Courts or cease doing business in this State"; and thereafter when the Railroad Co. refused to accede to that condition, it would have been properly punishable.

The Court, however, expressly refused to apply any such reasoning in *Barron* v. *Burnside*, and held that as the State undertook to make the railroad abstain from the Federal Courts or cease doing business in the State, the statute attempting to impose such a condition upon a foreign corporation was absolutely void; and being void, no one could be punished for violating any provision thereof.

Suppose an agent of the Insurance Company should continue to do business after its license was revoked, and was arrested, found guilty of a misdemeanor, and fined under Ky. Stat., §633, which provides that penalty for any agent who does business after the license is revoked; would he not be discharged from custody by the Supreme Court on a writ of *habeas corpus*, exactly as the engineer was in *Barron* v. *Burnside*?

As a reason for distinguishing the two cases, the Court of Appeals says that the *Doyle* case involved the right to revoke a license, while *Barron* v. *Burnside* involved the right to punish for a violation of the statute, but it is citing a mere incident of the decision, whereas its foundation has been destroyed; and this leads to an independent demonstration that the *Doyle* case was overruled.

In the *Doyle* case this court held that an injunction would not lie, because it *first* reached the conclusion that the statute in question was perfectly valid. The question was whether a statute was constitutional which provided that if a foreign corporation removed a case, its license should be revoked.

The court decided that such a statute *was* constitutional, and *therefore*, as a necessary result of such a decision, the Commissioner had the right to revoke the license, and of course an injunction would not lie to restrain him from doing what a valid law commanded him to do. So the fundamental question was not whether an injunction would or would not lie, but whether such a statute was constitutional.

On the contrary, in *Barron* v. *Burnside*, a similar statute, which provided that if a foreign corporation removed a case, its license should be revoked, was held void—the direct opposite of the *Doyle* ruling—and as a necessary consequence, of course, the engineer could not be punished for doing an act which was in violation of a *void* statute, and so he was released by a writ of *habeas corpus*.

Clearly the method by which the validity of a statute is drawn in question is but an incident to the decision, and establishes nothing. The fact that in the one case (*Doyle*) the validity of the statute arose upon a bill to enjoin its enforcement, while in the other (*Barron* v. *Burnside*) it arose upon an attempt to enforce a violation of it, is quite immaterial. Whether the constitutionality of a law be tested either by one party trying to enforce it, or the other trying to prevent its enforcement, is a matter of no consequence in determining the effect of the statute and the validity of the rights or obligations thereunder. No matter how raised, the fundamental inquiry is, whether the statute is valid or void. All other points are but incidents.

Therefore, as the *Doyle* case (in 1876) decided that a statute was valid, and eleven years later *Barron* v. *Burnside* decided that an exactly similar statute was void, is it not perfectly plain that it overruled the *Doyle* case?

The correct way of stating the effect of those cases is, *not* to say that one decided an injunction would not lie and that the other decided that an engineer could not be fined, but to say that in the *Doyle* case, a Wisconsin statute was held valid which provided for the revocation of a license upon a removal to the Federal Court, while in *Barron* v. *Burnside* an Iowa statute to the same effect was held void. It is the *constitutionality* of the statute (however the question may arise by a particular case for adjudication) which is the real thing decided—all else is but incidental.

The Kentucky Statute, §631, being substantially identical with both the Iowa and Wisconsin statutes on that point, must share the fate of the latest decision, and be held void.

C.

In adopting the reasoning of the *Doyle* case, the Court of Appeals said (R. 19, 20):

> "The license which the State grants is purely a matter of grace, and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it, he takes it subject to revocation. He can not question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State, with or without reason.
>
> "If I have license to cross my neighbor's lot and he revokes it because I brought a suit against his son, I can not enjoin him from revoking the license, on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just cause for his revoking the license he had given me; for he had an absolute right to revoke the license, and the fact that he did it out of spite or for a bad reason is immaterial. . . . The naked question presented here is, may the State, without cause, revoke a license it has once granted?—for a bad reason is no worse than none at all."

That argument is subject to the criticism made of the *Doyle* case (p. 50 *et seq.*, *supra*).

1. A State can do nothing except through its representatives, and of course it can revoke a license—expel a company—with or without

reason, so far as the motives actuating its Legislature are concerned; but the statute in question is not such a revocation at all. It is an executory conditional regulation of a corporation's future conduct, and the analogy does not hold good; the validity of such a statute must be determined by other principles.

2. The illustration about a license over a neighbor's lot is faulty, because:

a. I have no right over my neighbor's lot except a license be first granted; whereas a foreign corporation has a common law right to enter a State until by a valid statute it is excluded or expelled.

b. The illustration again assumes and refers to the exercise of the right of revocation *in presenti* (which right we concede to the State), and does not refer to a condition for the future, which is a very different thing.

c. In order to make the analogy at all accurate, we must assume a case where the provision in question has to be relied on by the revoking party.

There is no authority for Mr. Prewitt to revoke the Security Mutual's license except

by invoking and sustaining Ky. Stat. §631; he can only justify his action by the statute.

So, in the illustration, we must assume a case where the neighbor is compelled to rely on the provision in order to revoke.

Suppose, then, that my neighbor, in order to revoke my right to cross his lot, were compelled to vindicate the validity of a provision that I should never bring a suit; such a provision would be void as against public policy, and if his right to revoke depended on the validity of the provision (and in the case at bar the right of Prewitt to revoke undoubtedly depends on the validity of the statute), he could not revoke.

Now, that is analogous to what occurred in *Insurance Co.* v. *Morse*, 20 Wall. 445.

The insurance company agreed not to remove a case as a condition of entering the State. When it attempted to remove a case, the State Court refused to surrender jurisdiction of the cause, and in order to justify its refusal had to rely on the validity of the agreement. That being void as against public policy, the State Court had to surrender the cause.

THIRD POINT.

The Insurance Commissioner having revoked the Security Mutual's license pursuant to Ky. Stat. §631, and solely because it had removed a case to the Federal Courts, an injunction was properly granted commanding him to restore the license.

This follows as a corollary to the foregoing argument.

If Ky. Stat., §631, is void, then of course the action of the Insurance Commissioner was unauthorized by law, for the bill alleges and the demurrer concedes that he revoked the license "pursuant to the provisions of the statutes above quoted," and "for the sole reason that the Security Mutual had removed said suit" (R. 4). He had no authority to revoke except under the statute. In short, if the State law (under which an official has acted or is about to act) is void because in conflict with the Federal Constitution, an injunction in the State Courts will lie to restrain him; the defendant in error indeed conceded as much below.*

*It is to be remembered that the bill for the injunction was filed in the *State* Court, and therefore there is no room to apply the *Doyle* case even as limited in *Barron* v. *Burnside*. The Federal Court is not attempting to restrain a State officer from revoking a license granted by the State. This writ of error merely brings up the constitutionality of Ky. Stat. §631.

This writ of error simply presents for review under Rev. Stat., §709, the single question of the validity of the Kentucky statute (§631) under the Constitution and laws of the United States. This Court is not called on to issue an injunction. It must only decide whether Ky. Stat., §631, is or is not repuguant to the Constitution and laws of the United States.

If the statute is valid, then of course the Insurance Commissioner was justified in revoking the license.

If, on the other hand, the statute is void, then, as the Court of Appeals of Kentucky rendered its decision in favor of the validity of the statute, its judgment must be reversed for that reason, and the cause remanded for further proceedings not inconsistent with this Court's opinion on the subject. In short, the plaintiff in error would then be entitled to a trial in the State Court according to the usual principles of equity jurisdiction there obtaining, with the added light to the lower court of an authoritative decision that §631 was void.

It must always be remembered that this is not a case where the Commissioner has revoked the license without giving any reason for his action, but with perfect frankness he has given

the plaintiff in error an opportunity to test squarely the constitutionality of the law, for the bill alleges and the demurrer concedes that in point of fact he acted pursuant to the statute, and revoked solely because of the removal.

When a statute is unconstitutional, no action can be lawfully taken under it.

In *Norton* v. *Shelby County*, 118 U. S. 425, 442, Justice Field said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

It is instructive to observe that the learned Justice's definition (which has been adopted by the encyclopedias and text-writers as correctly expressing the effect of an unconstitutional statute—6 Am. and Eng. Encyc. Law, 1091) was based upon the Kentucky case of *Hildreth* v. *McIntire*, 1 J. J. Marsh. 206, from which he quoted at great length.

Hildreth v. *McIntire* arose out of the "Old" and "New" Court controversy in this State, and decided that the act of the Legislature creating the "New" Court was uncon-

stitutional; that all acts thereunder were void; and that nothing valid could be predicated under it.

Therefore, if §631 be unconstitutional, the act of the Commissioner, avowedly taken "pursuant" thereto, becomes unlawful and void, and on well-settled principles a Court of Equity in Kentucky will always restrain a State officer from acting under an unconstitutional statute.

It must always be remembered that in this case the action of the Commissioner was taken "pursuant" to and solely under that statute and as said in Cooley's Constitutional Limitations, page 188:

> "When a statute is adjudged to be unconstitutional, it is as if it has never been. Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."

In short, if the statute is void, then the Commissioner's act taken under and pursuant thereto must also be illegal and unauthorized, and the injunction must be granted; for, as aptly said in the dissenting opinion of Barker, J. (R. 29):

> "Take a pen and erase from the face of the statute those parts which are admitted to be invalid, and then it will present its legal attitude toward foreign corporations; and nothing will be left which authorizes the revocation of the license."

Logically, under the opinion of the Court of Appeals in this case, the right of every foreign corporation to do business in the State is *ipso facto* revoked upon the removal of a case, and such corporation could by injunction be prevented from continuing longer in the State; for the case of *Commonwealth* v. *East Tennessee Coal Co.*, 97 Ky. 238, is certainly overruled.

Practically, no effort has been or will be made by State officials to interfere with corporations for removing a case, except insurance companies. The injustice is obvious. As aptly said by the Trial Court (Gordon, J.) (R. 11):

> "The right of every foreign corporation, except *insurance* companies, to transfer its cases from the State to the Federal Court, without forfeiting its right to do business in this State, is recognized and established. Such legislation as is here condemned as being unconstitutional as it in affects all other foreign corporations I can conceive of no good reason for holding constitutional as to insurance companies."

The concluding words of Judge Barker's dissenting opinion may well close this brief (R. 30):

"The opinion of the majority, as said heretofore, is not only contrary to authority, but also to reason. The policy of the national law under discussion is to place, as far as possible, a citizen of one State engaged in litigation with a citizen of another State on a plane of equality before the law; in other words, to make it possible that the stranger may defend his property or rights free from the bias of local prejudice or passion. No disinterested mind will deny that this is a just policy. The question, then, is whether this beneficent policy in the interest of a fair and impartial trial to the foreign citizen may be nullified by a statute enacted for the selfish purpose of giving the citizen the advantage of a trial close to his home (to put the most favorable construction on it), without any regard to the still greater distance of the stranger from his home, and his inconvenience on that score, or of the danger of his suffering from local prejudice or passion in a suit with the citizen. The State statute considers only the convenience of the citizen as measured by the additional distance to the place of trial after removal of the case to the Federal Court, and ignores the danger to the foreigner of a miscarriage of justice on the merits of the controversy, arising from local prejudice or passion in the State tribunal. The existence of such a statute, in itself, affords a justification of the national policy, as expressed in the removal statutes, if such justification were needed.

"It may not be altogether impertinent to the subject in hand to say, in conclusion, that it would be well to remember that it is a narrow and provincial view to regard these national laws as harsh and severe edicts imposed by a foreign suzerain, instead of benignant laws imposed by ourselves in the interest of a broad and national justice, and that, in their practical operation, many more of our own citizens are benefited by them in their litigation in other States than are inconvenienced by them in favor of citizens of foreign States litigating in our Commonwealth."

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be reversed, and the cause remanded for further proceedings consistent with an opinion of this Court declaring that the whole of Ky. Stat. §631 (or at least so much of it as provides that if a case is removed to the Federal Court the license shall be revoked) is unconstitutional.

F. W. JENKINS,
JULIEN T. DAVIES,
CHAS. S. GRUBBS,
WM. MARSHALL BULLITT,

Counsel for Security Mutual Life Ins. Co., plaintiff in error.

LOUISVILLE, KY., 2 January, 1906.

APPENDIX.

The following provisions from the Kentucky Statutes (Ed. 1903) show (1) the penalties for removing cases to the Federal Courts or for transacting business without a license, and (2) the powers of the Insurance Commissioner over foreign insurance companies.

§572. Action—removal to or institution in Federal Court forbidden—penalty. If any foreign corporation shall, without the consent of the adverse party, *remove to a Federal Court* any action pending against it in any court of this State or institute an action against a citizen of this State in a Federal Court of this State, *such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State;* and such corporation, and any officer, agent or employe thereof, who shall thereafter transact or engage in any business of employment for such corporation in this State shall be severally guilty of a misdemeanor, and upon indictment and conviction in the circuit court of any county in which such corproation, or any officer, agent or employe thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars.

§634—Foreign companies to furnish copy of charter—license to agents. Every insurance company not organized under the laws of this State, before transacting any business in this State, if it has not already done so, shall return to the Commissioner a copy of its charter, articles of association, or deed of settlement, by whatever name its organic law may be called, and the Commissioner, upon being satisfied that such company has fully complied with the laws of this State, and is possessed of the legal reserve, shall furnish to such agents as the company directs a license to transact business as agent for said company under the seal of the Insurance Department.

§631. Foreign corporation—process—action—removal to or institution in Federal Court forbidden. Before authority is granted to any foreign insurance company to do business in this State it must file with the Commissioner a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; *and if any company shall*, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, *remove said suit or proceeding to any Federal court*, or shall institute any suit or proceeding against any citizen of this State in any Federal court, *it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State*, and to publish such revocation in some newspaper of general circulation published in the State.

§633. Agents of foreign companies—who are—penalty for doing business without license. Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the Commissioner that the company represented by the agent has fully complied with the law, and maintains its required capital or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance, or a policy of insurance to or from such company, or advertises that he will receive or transmit the same, or who shall, in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the Commissioner to act as

such agent, or, after such license has expired, been suspended or *revoked*, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held to be guilty of a misdemeanor, and, upon conviction for such offense, shall be fined not less than fifty nor more than one hundred dollars for each offense.

§754—Violation of laws—duty of Commissioner in cases of. When, in his opinion, the officers or agents of an insurance company have violated any law of this State relative to such company, the Commissioner shall forthwith report the facts, with the testimony reduced to writing, and signed by the witness, upon which his opinion is founded, to the Attorney General, whose duty it shall be to at once, if he deems it proper, prosecute such company, officer or agent therefor.

§753. Proceedings if company unsound or violating law—publication—notice to agents—penalty for doing business—injunction—costs. If he is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or if it has failed to comply with the law, or if its officers or agents refuse to submit to examination or to perform any legal obligation in relation thereto, or, if a life insurance company, that its actual funds are less than its liabilities, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notifications thereof to be published in some newspaper of this State having general circulation therein ; and no new business shall thereafter be done by it or its agents in this Commonwealth while such default or disability continues, nor until its authority to do business is restored by the Commissioner. If, upon examination, he is of opinion that any domestic insurance company is insolvent, or has exceeded its powers, or has failed to comply with any provision of law, or that its condition is such as to render its further proceedings hazardous to the public or to its policy-holders, he shall revoke or suspend all licenses issued to it or its agents and

cause notice thereof to be published in some paper having general circulation in the State; and it is hereby also made the duty of the Commissioner to immediately notify the general agents of the foreign or domestic company suspended of the suspension, and it shall be the duty of said agents to immediately notify persons insured by them of such suspension by the Commissioner, and for failure so to do upon the part of the Commissioner or agent, he shall be fined not less than fifty nor more than one hundred dollars for each offense; he shall also apply to the judge of the Franklin Circuit Court or the judge of the circuit court where the company is located, to issue an injunction restraining it in whole or in part from further proceeding with its business. Such judge may, in his discretion, issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify such injunction or make it perpetual; and may make all orders and decrees needful in the premises, and may appoint agents or receivers to take possession of the property and effects of the company, and to settle its affairs subject to such rules and orders as the court may from time to time prescribe, according to the course of proceedings in equity: *Provided*, That if any injunction issued hereunder be dissolved, and the court or judge dissolving the same shall not state in the order or decree of dissolution that there were reasonable grounds for procuring such injunction, the cost of such proceeding shall be taxed and paid out of the funds of the Insurance Department.

FILE COPY.

NO. 178.

OFFICE OF THE CLERK
RECEIVED
APR 2 1906
SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, . . Defendant in Error.

Motion and Petition for Re-Hearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT.

Counsel for the
SECURITY MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. NOTICE.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, is hereby notified that on Monday, April 2, 1906, the plaintiff in error, the Security Mutual Life Insurance Company, will, at the opening of the court on that day, submit a motion to file petition for rehearing and brief, and in connection therewith will file affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and will ask that said letter and affidavit be read on the hearing of said petition.

March 29, 1906.

WM. MARSHALL BULLITT,
CHAS. S. GRUBBS,
Counsel for the Security Mutual Life Insurance Company, Plaintiff in Error.

The foregoing notice is hereby accepted and the delivery to me of a copy of said motion, together with affidavit and letter named is acknowledged, this 29th day of March, 1906.

J. H. HAZELRIGG,
Counsel for Henry R. Prewitt, Insurance Commissioner, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. MOTION.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The plaintiff in error, the Security Mutual Life Insurance Company, moves the court for leave to file herein its petition for rehearing and brief, and as a part thereof, files affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and asks that said affidavit and letter be read on the hearing of said petition.

WM. MARSHALL BULLITT,

CHAS. S. GRUBBS,

Attorneys for Security Mutual Life Insurance Company, Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. AFFIDAVIT.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The affiant, Wm. Marshall Bullitt, says that he is a practicing lawyer, a member of the Jefferson county bar of Louisville, Kentucky, and having been of counsel for the

Security Mutual Life Insurance Company since the institution of the original action in the Jefferson Circuit Court, he is familiar with the several steps taken in the conduct of this case. The affiant says that the questions in issue herein being undetermined on July 1, 1905, and the parties desiring to preserve the status pending the appeal to this court, and the annual tax due to the State of Kentucky being paid, the Insurance Commissioner consented to, and did conditionally, renew the license for one year from July 1, 1905, as shown by letter of Henry R. Prewitt, Insurance Commissioner, dated March 23, 1906, to Grubbs & Grubbs, filed herewith and made part hereof, marked "A."

WM. MARSHALL BULLITT,

Subscribed and sworn to by Wm. Marshall Bullitt, before me this 29th day of March, 1906. My commission expires 6th day of February, 1910.

E. G. NORTON,
Notary Public Jefferson
County, Kentucky.

"A."

March 23, 1906.

Grubbs & Grubbs,
Louisville, Ky.:

Dear Sirs: Yours of the 22d inst., to Judge James H. Hazelrigg of this city, concerning the case of the Security Mutual Life Insurance Company against myself as Commissioner, was this day handed to me by Judge Hazelrigg, and in reply thereto will say that in renewing the license of the Security Mutual Life Insurance Company, I did so with the understanding that the new license should in no way affect the rights of the Commonwealth in the litigation pending between the Commonwealth and the company; I reserved all rights of the Commonwealth to cancel the license at any time. There was no record made at the time of renewing the license. Yours very truly,

HENRY R. PREWITT,
Insurance Commissioner.

NO. 178

In the Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, . Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky . . . . . Defendant in Error.

PETITION FOR RE-HEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Security Mutual Life Insurance Company, plaintiff in error, respectfully prays for an order directing a re-argument of this cause upon the following grounds:

First.—The absence of any argument whatever, either oral or in any of the briefs, by counsel for either party upon the point on which this court disposed of the case, due to a failure on counsel's part to anticipate that this court would either consider or decide the case upon a ground not raised by counsel.

Second.—The misconception by this court of the issues really involved in the litigation, and an erroneous view of the laws of Kentucky as to the admission of foreign insurance companies to do business within the State, a correct understanding of which demonstrates that the question involved has not become (as this court decided it had) a "moot question," but is still a matter of live and vital moment.

Third.—Because the license granted July 1, 1904, expiring July 1, 1905, was, on that date, in order to prevent injustice to the plaintiff in error renewed, not absolutely, but only conditionally, pending this appeal, for another year, as appears by the letter of the Commissioner of March 23, 1906.

Fourth.—The great practical importance of the decision upon the rights of the plaintiff in error, depriving it of the possibility of relying upon a right guaranteed to it by the Federal Constitution and subjecting it to a destruction of its business in the State of Kentucky without any prospect of relief, and all due not to any lack of diligence on its part, but to the delay of this court in setting the cause down for argument.

Fifth.—Because if the judgment of the Court of Appeals of Kentucky is erroneous, plaintiff in error is entitled to its costs.

Your petitioner respectfully requests an attentive consideration to the annexed brief, wherein the grounds above mentioned are more fully stated and supported, and prays that this cause may be set down for re-argument upon some day to be appointed by the court.

And so your petitioner will ever pray.

F. W. JENKINS,
JULIEN T. DAVIES,
CHAS. S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

I certify that, in my opinion, the foregoing petition for rehearing is well founded.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING.

First Point.

THE ABSENCE OF ANY ARGUMENT WHATEVER, EITHER ORAL OR IN ANY OF THE BRIEFS, BY COUNSEL FOR EITHER PARTY UPON THE POINT ON WHICH THIS COURT DISPOSED OF THE CASE, DUE TO A FAILURE ON COUNSEL'S PART TO ANTICIPATE THAT THIS COURT WOULD CONSIDER OR DECIDE THE CASE UPON A GROUND NOT RAISED.

This court held that this was a suit to compel a restoration of a license; that the life of the license expired by its own terms pending the litigation, and that therefore there was nothing left to litigate about; that you could not compel the restoration of a thing which, by the lapse of time, had ceased to exist. That point was not in any way raised or discussed at the oral argument or in the briefs (for reasons which will be given hereafter), and the court in deciding the case on such a point was deprived of the views of counsel on the subject, and, as will be seen, not unnaturally fell into error as to what this litigation really embraced.

The point was not overlooked or intentionally ignored by counsel, but the counsel for both parties conceived that no such point really existed under the statutes of Kentucky. Should not this court be willing to afford an opportunity to hear counsel on so important a matter?

Second Point.

THE MISCONCEPTION BY THE COURT OF THE ISSUES REALLY INVOLVED IN THE LITIGATION AND AN ERRONEOUS VIEW OF THE LAWS OF KENTUCKY AS TO THE ADMISSION OF FOREIGN INSURANCE COMPANIES TO DO BUSINESS IN THE STATE, A CORRECT UNDERSTANDING OF WHICH DEMONSTRATES THAT THE QUESTION INVOLVED HAS NOT BECOME (AS THIS COURT DECIDED IT HAD) A "MOOT QUESTION," BUT IS STILL A MATTER OF LIVE AND VITAL MOMENT.

This court, in its opinion, said:

> "Section 635,* Kentucky Statutes, provides that these licenses or permits must be renewed *annually* . . . It appears that the laws of Kentucky require the *annual* renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the State, and without such license the company is prohibited from doing any business therein. . . . If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired and the company would still be without power to do business in the State until another permit should be granted. To adjudge that the old permit remains good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it."

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*Evidently a misprint for Sec. 633.

It is thus seen that the court disposes of the case upon the theory that the suit below was one to secure the restoration of the so-called annual license dated July 1, 1904, and that except as acting under such specific one-year license the insurance company had no authority to do business in the State.

That is a radical misconception of the laws of Kentucky on the subject.

The laws of Kentucky do not require the annual renewal of a license to a foreign insurance company in order that the company may continue to do business in the State, and there is no provision in the law for the issuance to a foreign insurance company of an annual permit nor for the renewal thereof; and this court, in holding to the contrary, was misled by the statute (section 633), which provides for the renewal of licenses to *agents* annually.

The law on the subject of the admission of foreign insurance companies is as follows:

It must file with the Insurance Commissioner a resolution consenting to the service of process upon an agent or upon the Commissioner of Insurance. (Ky. Stats., sec. 631); and it shall file with the Commissioner of Insurance a copy of its charter and be possessed of the legal reserve, and when those conditions have been complied with the law is mandatory that the Insurance Commissioner "shall furnish to such agents as the company directs, a license to transact business as agents for said company." (Ky. Stats., sec. 634.) These licenses to agents "must be renewed annually" upon a finding by the Commissioner that the company has complied with the law and has the required reserve (Ky. Stats., sec. 633). If the Insurance Commissioner finds that any foreign insurance company has failed to comply with the law, or is insolvent,

he shall revoke or suspend its authority to do business, and shall notify its agents of such suspension, and they in turn shall notify the policyholders. (Ky. Stats., sec. 753.) The Insurance Commissioner is also required to apply for an injunction restraining the company from further proceeding with its business, and the court may appoint a receiver "to take possession of the property and effects of the company and to settle its affairs." (Ky. Stats., sec. 753.)

It is thus seen that there is no express provision in the law for issuing an annual license to the company, but when it shall have been admitted into the State to transact business the authority to continue within its limits is a continuing one until revoked, and by the principle of "comity" it has the right to continue to do business in the State until expelled.

It is true that as a mere matter of practice the insurance department of the State has been in the habit on the first of July in each year of issuing a so-called certificate to foreign insurance companies, authorizing them to transact business in the State for one year, a copy of which will be found on page 3 of the record. There is no authority of law for the issuance of that certificate. It is superfluous and is a mere matter of administrative convenience. The Commissioner adopted it as his method of making an annual "finding," as required by Kentucky Statutes, section 633, as a condition precedent to the renewal of licenses to agents.

By Kentucky Statutes, section 4226, each insurance company is required, on July 1st of each year, to make a statement of the amounts of its premiums collected and to pay a tax of $2 upon each $100 thereof, and accordingly the certificate referred to is issued as a matter of convenience on that date as a receipt and as evidence that the

company has complied with the law, and it is not issued pursuant to any express or implied authority or requirement of the statutes.

We submit therefore that this court erred in holding that "the laws of Kentucky required the annual renewal of the permit to any foreign insurance company;" that "without such license the company is prohibited from doing business therein."

Indeed, a careful inspection of the petition for the injunction shows that the gist of the case was not to compel a restoration of the mere renewal certificate dated July 1, 1904; for while the certificate is copied into the bill, it is not referred to as the basis or authority of the company to do business, but, on the contrary, the theory of the bill is, that when the insurance company was permitted to enter the State it was entitled to remain there and to continue to transact its business until it was expelled by some affirmative action. Its right to do business did not expire with the expiration of the year for which the so-called certificate was granted. The certificate which is issued each year by the Commissioner is only evidence of the fact that the company had at the time stated complied with all the laws of the State, and can not in any manner add to or take from the authority theretofore exercised by the company to continue to do business indefinitely.

In so far as the certificate is set out in the petition it is a mere formality and is not referred to anywhere else except in that one place, and the action of the Commissioner is not stated to have been a revocation of that certificate or license, but the bill alleges that the Commissioner "revoked the authority of the Security Mutual to do business in the State of Kentucky," which refers not to the mere yearly permit, but to the prior authority which the com-

pany had to do business in the State ever since the year 1900, when it was first admitted.

Kentucky Statutes, sections 572 and 631, are both anti-removal statutes, and are both set out in the petition (Rec. 4). They contemplate an indefinite continuance of business in the State and an absolute revocation of authority upon removal; and when a company has removed a suit, its right to do business in the State is absolutely forfeited, and there is no provision for again admitting it into the State.

In Barron v. Burnside and in Doyle v. Insurance Company, there were provisions in the State statutes for allowing the company to come back into the State after a certain period subsequent to the removal, but in the Kentucky Statutes there is no provision for ever allowing a company to again re-enter the State.

There is another aspect which shows that the questions are not mere abstract questions:

By virtue of the revocation of the license the Insurance Commissioner became entitled, under Kentucky Statutes, section 753, to enjoin the company from further transacting business in the State and to obtain a receiver for all its property and effects in the State and to settle up its affairs.

The bill for an injunction was not only to set aside the revocation, but also to restrain the Insurance Commissioner from enjoining the company from transacting business and from obtaining a receiver of its property and effects. The right of the Insurance Commissioner to obtain a receiver for the property and effects of the company did not expire with the life of the permit, and therefore if this court's opinion shall stand we have the anomalous condition of affairs that the rights of the company have expired so that it can obtain no adjudication from this

court; and yet the questions involved are alive enough to enable the Insurance Commissioner to obtain a receiver for the company. The right of the Insurance Commissioner to a receivership of the company exists only by virtue of the validity of his revocation of its right to do business in the State, and upon the dismissal of this writ of error the Insurance Commissioner is free to have a receiver appointed for the company. That shows that the questions involved in this proceeding are not mere abstract questions, but in that aspect at least are still alive.

Suppose when the mandate of this court is sent down and the supersedeas ceases to be effective, that the Insurance Commissioner should then proceed to ask for a receiver upon the ground that this company's license had been revoked in September, 1904. What defense could the insurance company interpose? It undertook to enjoin him from doing that thing upon the ground that he was infringing a constitutional right. The Court of Appeals of Kentucky has decided that he did not infringe any constitutional right, and the supreme court has dismissed the writ of error on the ground that the question involved was merely an abstract one, and yet, when the case comes back to the State court, it will be perfectly free to grant all the relief that the Insurance Commissioner wants.

We respectfully submit that this court has overlooked one of the most important features involved in this litigation, and it was on account of the full appreciation by counsel for both sides that a mere annual permit was not the basis of the authority of the company to do business in the State that the question was not raised on the oral argument or in the briefs.

Third Point.

BECAUSE THE LICENSE GRANTED JULY 1, 1904, EXPIRING JULY 1, 1905, WAS, ON THAT DATE, IN ORDER TO PREVENT INJUSTICE TO PLAINTIFF IN ERROR, RENEWED, NOT ABSOLUTELY, BUT CONDITIONALLY, PENDING THIS APPEAL, FOR ANOTHER YEAR, AS APPEARS BY THE LETTER OF THE COMMISSIONER OF MARCH 23, 1906.

When the trial court (Gordon, J.) entered the judgment on October 29, 1904, directing the insurance commissioner to cancel his revocation and to grant authority to the plaintiff and its agents to transact the business of life insurance in the State of Kentucky (Rec. 12), the Commissioner obeyed the order of the court and restored to the plaintiff its authority to do business in the State.

On December 5, 1904, the Court of Appeals reversed the judgment of the trial court, but the writ of error sued out from this court operated as a supersedeas and so the matter remained in *statu quo* pending the hearing of the case here.

On July 1, 1905, the company paid its annual tax and it was also necessary for the agents to renew their licenses under Kentucky Statutes, section 633. Inasmuch as the right of the Security Mutual to do business in the State of Kentucky was not based upon the so-called annual permit, the Insurance Commissioner recognized that, if Kentucky Statutes, section 633, was unconstitutional and did not authorize his revocation of its right to do business in the State, it would be a great injustice to hamper the company by refusing to renew the so-called annual permit or by refusing to renew the annual licenses to the agents.

The Insurance Commissioner, in a spirit of fairness which characterizes his whole action in this proceeding, did not wish to destroy the company's business by assuming that its right to do business in the State depended upon the annual renewal of the licenses and thereby escape the operation of the supersedeas by making the technical claim that the renewal of the license did not come within the prohibition of the supersedeas and therefore, on July 1, 1905, in order that the status of all parties might be preserved upon the payment by the company of its annual tax, he renewed the license until July 1, 1906.

The letter of the Commissioner shows that the renewal is conditioned on the action of this court, and that we will be turned out of the State without a decision on the merits of the claim.

We submit a renewal made under such circumstances is a renewed threat of a revocation of the license and of all authority to do business in the State if this writ of error should be dismissed.

While courts decline to decide moot or abstract questions, nevertheless they encourage any action on the part of litigants in real controversies that facilitates the administration of justice (Lord v. Veazie, 8 Howard, 252), and it is in this spirit that the Commissioner issued his renewal conditionally.

Facts which affect the right of the court to proceed or which show that a question has become abstract may be proven by extrinsic evidence. Dakota Co. v. Glidden, 113 U. S., 225, 226; Mills v. Green, 159 U. S., 654; Kimball v. Kimball, 174 U. S., 162; Jones v. Montague, 194 U. S., 147, 153.

The principle which allows the expiration of jurisdiction to be proved dehors the record will permit evidence contradicting an inference that a question is "moot" and therefore we file the affidavit containing the Commissioner's letter.

Fourth Point.

THE GREAT PRACTICAL IMPORTANCE OF THE DECISION UPON THE RIGHTS OF THE PLAINTIFF IN ERROR, DEPRIVING IT OF THE POSSIBILITY OF RELYING UPON A RIGHT GUARANTEED TO IT BY THE FEDERAL CONSTITUTION AND SUBJECTING IT TO A DESTRUCTION OF ITS BUSINESS IN THE STATE OF KENTUCKY, WITHOUT ANY PROSPECT OF RELIEF, AND ALL DUE NOT TO ANY LACK OF DILIGENCE ON ITS PART, BUT TO THE DELAY OF THIS COURT.

A court, especially the Supreme Court of the United States, we take it for granted, is reluctant to refuse to decide a case before it when the question involved is the important claim of the protection of a constitutional provision; and when a litigant specially sets up and claims in a State court some right, privilege or immunity under the Federal Constitution and that right, privilege and immunity is there denied. This Honorable Court, unless the law imperatively demands it, will necessarily hesitate to so dispose of a case so as forever to deprive the litigant of the opportunity to have its right under the Constitution judicially passed upon by the court specially created for that purpose.

The practical effect of this court's decision is this: The Insurance Commissioner did not merely cancel the so-called and superfluous yearly license which this court alleges to have expired on July 1, 1905, but he also "revoked all authority of the Security Mutual" to do business in the State, such revocation being for all *future* time. By the dismissal of this writ of error, the judgment of the State court dis-

missing the bill for an injunction becomes *res judicata;* the seal of approval is placed on the Insurance Commissioner's action in revoking the authority to do business; he is free now to notify all policyholders of such revocation; and he may enjoin the company from further transaction of its business and secure a receiver for its property and effects in this State (Ky. Stats., sec. 753), and all because it removed a case to the federal courts.

This writ of error was filed January 27, 1905; the record was filed in this court February 13, 1905; it was printed at once; a motion to advance, as authorized by statute (U. S. Rev. Statutes, sec. 949), was made in March, 1905, and was denied in April, 1905. In short, the plaintiff in error did all in its power to secure a decision by this court before the expiration of the license, and if the case had then been advanced (as it subsequently was), a decision could have been had before July 1, 1905. Should a litigant be deprived of the opinion of this court on a great question of constitutional right because this court declines to consider the case until it is too late to decide it, and then assigns such delay as a ground for dismissing the writ? If the present opinion be adhered to it would be impossible ever to get the question decided, for no matter how promptly a case were heard below, this court might never decide it before the year expired.

The plaintiff in error, for having removed a case to the federal court, is not only deprived of relief in this court, but its business will be destroyed, and it is at the mercy of the Insurance Commissioner, and all because it exercised a right conferred by the Federal Constitution.

The question raised by this writ of error is therefore not an abstract one at all; the gravest practical results will follow from it, and we respectfully submit that a re-argument should be ordered so as not to foreclose a question on which counsel have not been heard.

Fifth Point.

BECAUSE IF THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY IS REVERSED, PLAINTIFF IN ERROR IS ENTITLED TO ITS COSTS.

Aside from the results which may come to plaintiff in error as suggested above, the practical effect of the opinion herein is to put upon plaintiff the costs, at least, in the courts below (Kentucky Statutes, 889). While this court has entire control of costs as well as the merits (Florida Internal Improvement Fund v. Greenough, 105 U. S., 527), ordinarily costs will not be considered in such cases, but in Pennsylvania v. Wheeling and Belmont Bridge Company, 18 Howard, 396 (cited in Mills v. Greene), the court awarded costs to the party who was adjudged to be correct on the main question, where an intervening act had made it impracticable to grant the relief sought in the original bill.

While appreciating the importance of the questions constantly pressing upon this court, we respectfully submit that, as the rule on which this case was decided is not of universal application, if correct in its main contention, the plaintiff in error should not, under the facts shown by this record, be subjected even to the costs.

We respectfully ask a rehearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Security Mutual Life Ins. Co.,
Plaintiff in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. ~~886~~. 178

Office Supreme Court U. S.
FILED
MAR 24 1905
JAMES H. McKENNEY,
Clerk.

SECURITY MUTUAL LIFE INSURANCE COMPANY OF BINGHAMTON, NEW YORK, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, . . . *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner. Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship.

Thereupon the commissioner canceled the license, when the company brought this action in the State court—Jefferson Circuit—to compel the insurance commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky

statute directing such cancellation was void, as in conflict with the Federal Constitution. The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed.

The reasons inducing the defendant in error to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to numerous insurance companies doing business in the State.

According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Insurance Commissioner canceled its license,

is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be assigned to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,
Counsel for Defendant in Error.

The plaintiff in error, Security Mutual Life Insurance Company, concurs in the request and motion of the defendant in error to advance this case.

WILLIAM MARSHALL BULLITT,
Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 530.

SECURITY MUTUAL LIFE INSURANCE COMPANY, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, . . . *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 3rd day of April, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 20th day of March, 1905.

SECURITY MUTUAL LIFE INS. CO.,

By WILLIAM MARSHALL BULLITT,

Counsel.

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 178

SECURITY MUTUAL LIFE INSURANCE COMPANY OF BINGHAMTON, NEW YORK, *Plaintiff in Error.*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

A motion to advance this case was made late in the last term (April, 1905), and was denied "*without prejudice.*" Accordingly, it is now renewed.

The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner (Record, 2, 3). Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship (R., 3).

Thereupon the Commissioner canceled the license (R., 4); and the company brought this action in the State court

—Jefferson Circuit—to compel the Insurance Commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky statute directing such cancellation was void, as in conflict with the Federal Constitution (R., 8-12). The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed (R., 14).

The reasons inducing the Insurance Commissioner, defendant in error, to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to numerous insurance companies doing business in the State.

According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind; and under the statute and the decision herein of the highest court in Kentucky, it is the duty of the defendant in error to immediately revoke the license of every insurance company in the State that removes a case to the Federal court.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a

Federal court, and under authority of which the Insurance Commissioner canceled its license, is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be advanced and assigned for oral argument to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,

Counsel for Defendant in Error.

The plaintiff in error, Security Mutual Life Insurance Company, concurs in the request and motion of the defendant in error to advance this case.

WILLIAM MARSHALL BULLITT,

Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 178

SECURITY MUTUAL LIFE INSURANCE COMPANY - - - - - - - - - *Plaintiff in Error.*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 16th day of October, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 21st day of September, 1905.

SECURITY MUTUAL LIFE INS. CO.,

By WILLIAM MARSHALL BULLITT,

Counsel.

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 29 1905
JAMES H. McKENNEY,
Clerk.

No. 178.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

THE SECURITY MUTUAL LIFE INSURANCE COMPANY, - *Plaintiff in Error,*

VERSUS

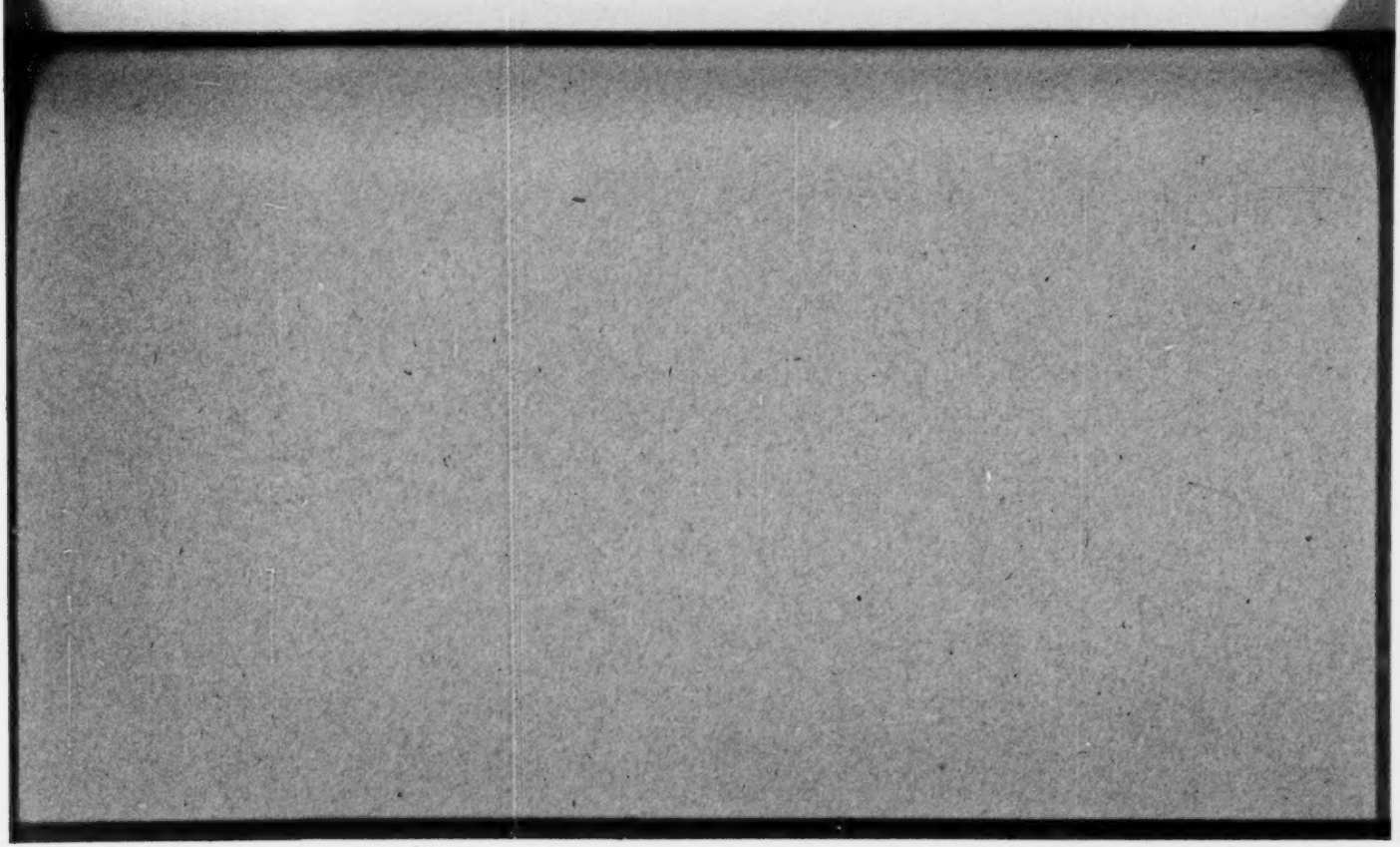
H. R. PREWITT, Commissioner - *Defendant in Error.*

BRIEF FOR PREWITT, COMMISSIONER.

J. H. HAZELRIGG.
Counsel.

N. B. HAYS, Attorney-General.
H. R. PREWITT,
HAZELRIGG & HAZELRIGG,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE SECURITY MUTUAL LIFE INS. CO., - - *Plaintiff in Error,*

vs. **No. 178.**

H. R. PREWITT, Commissioner, - - - - - - *Defendant in Error.*

BRIEF FOR PREWITT, COMMISSIONER.

THE FACTS.

In an action in the Owen Circuit Court by Crain & Gayle against the Security Mutual Insurance Company, a foreign corporation, the company, on the ground of diverse citizenship, filed its petition and removed the case to the United States Circuit Court. Thereupon Prewitt, State Commissioner, the present defendant in error, revoked the license of the company to do business in this State. Thereupon, this action was brought by petition in equity against him, to enjoin him from effectuating the revocation by publishing same as the law required him to do, and in effect to compel him to set aside the order of revocation.

The case was heard in the Jefferson Circuit Court on demurrer, and the judgment was for the plaintiff.

An appeal was prosecuted by the Commissioner, and the Court of Appeals of Kentucky reversed the judgment and directed a dismissal of the petition. Thereupon, this writ of error was sued out.

THE QUESTION INVOLVED.

The statute under which the Commissioner acted is as follows:

> "**Sec. 631. Foreign Corporations—Process—Action—Removal to or Institution in Federal Court Forbidden.** Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty at once to send it by mail addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State."

This statute, says the company, is unconstitutional and void in that it seeks to deprive it of a right guaranteed to it by Federal law to take its cases to the Federal courts, and no action or contemplated action of the Commissioner based on such statute can be upheld.

The Commissioner insists that the constitutionality of no law, State or Federal, is involved. He admits that the statute is powerless to prevent such removal, but insists that the State may revoke or cancel its permit for any

reason whatever, and that injunction will not lie to prevent the State acting by its Commissioner from withdrawing such permit to the company to transact business in the State, whenever it pleases and for whatever reason it may suggest; or even without any reason, so long as it stops short of *depriving* the company of any right guaranteed to it under the Constitution. That should the Commissioner refuse to revoke as is made his duty to do under the statute, he himself could be compelled to do so by mandamus.

Perhaps we can state our position no more clearly than is stated by the learned author of the article on "Foreign Corporations" in 13 A. & E. Ency. of Law (2nd ed.), 867. He says:

> "In a number of States statutes have been enacted making the right of foreign corporations to do business in such States conditional on their agreement not to remove suits in which they are parties from the State to the Federal courts. These statutes have been almost uniformly declared unconstitutional and void, on the ground that every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him and agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void.
>
> "Notwithstanding the invalidity of these statutes, a cancellation and revocation of a foreign company's license and authority to do business in the State for a breach of such an agreement is *a valid exercise of the power of the State to exclude foreign corporations for any reason whatever.*"

It may be worth while to say here that our contention is not that the *Commissioner* may arbitrarily refuse a license or arbitrarily revoke one, when the company has complied with all the requirements of the law.

No such question is involved. When the company has exercised its undoubted right to remove its case, then the statutes make it the imperative duty of the Commissioner to revoke, and this power, we contend, the State undoubtedly possesses.

SYNOPSIS OF THE ARGUMENT.

The Insurance Commissioner is the officer charged with the duty of issuing licenses or permits to foreign insurance companies to do business in Kentucky, and he it is who is charged with the duty of revoking such licenses, in some instances exercising his discretion, and in other instances controlled by positive statutory enactment.

We are dealing with the latter class. Here the ground for which the Commissioner is to withdraw the license is fixed by the statute (631 Ky. Statutes). That ground is founded, if we may conjecture as to the reasons which may have controlled the law-makers, on the supposed inconvenience to which the citizens might be subjected should the company remove its cases away from the vicinage of the transaction out of which such cases usually grow to a remote locality. But whatever may have been the reasons which controlled the legislature, it is the contention of the Commissioner that neither he nor the companies can question or inquire into these reasons, or ask the courts to do so.

The foreign company may of course take its case into the Federal court. That is its constitutional right. The State must and does recognize this right in the statute we are considering. Nevertheless, when the removal is made, the State, in the exercise of its right to let in, or not let in, foreign companies, its right to license or not to license

them to do business within its borders, may properly impose the duty on the Commissioner of withdrawing the license. This is in accordance with the universal rule *that a licensor at his pleasure may, with or without a reason, withdraw a license granted by him,* and is further within the conceded power of the State to exclude the company in the first instance.

The Federal Constitution nowhere attempts to direct the State as to when or why it may permit a foreign company to do business within its limits, or remain after it gets there, or as to when or why it may refuse to let in the foreign company—except, of course, when the company's business is of a Federal nature. Nor does that Constitution direct when or why the State may withdraw its license issued to a foreign insurance company to do business in its borders.

When examined carefully the contention of the respective parties hereto are separated by an exceedingly narrow margin. Thus after a full review of the authorities, opposing counsel conclude (page 11 of their brief) that:

> (1) "A State may, by a valid affirmative expression, prohibit the entrance of, or expel, all foreign corporations which are not engaged in interstate commerce, or in performing a Federal function."

(Citing Paul vs. Virginia, 8 Wall., Horn Silver Mining Co. vs. New York, 143 U. S. 305.)

And further (Pg. 12), that:

> "A State may prescribe the terms or conditions upon which a foreign corporation (except those indicated) will be admitted to carry on their business."

(Citing Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727; Horn Silver Mining Co. vs. New York, 143 U. S. 305; Hooper vs. California, 155 U. S. 648; Waters-Pierce Oil Co. vs. Cravens, 178 U. S. 389.)

> (4) Those terms or conditions must not be inconsistent with, or repugnant to, the Constitution and laws of the United States.

To relieve themselves from the force of their first proposition, counsel then assume the position that the State has not by valid affirmative expression expelled the plaintiff in error from the State, and to escape the force of the second, they say that the statute imposing the duty on the Commissioner of revoking the license whenever the company has removed an action against it, is the imposition of "Terms and Conditions" which are inconsistent with the Constitution and laws of the United States.

II.

Has the State by any valid affirmative expression expelled the company from its territory? To understand counsel's contention here, we take the liberty of referring further to their argument, wherein they say that:

> "The mere naked exclusion or the revocation of the license of an insurance company is an act within the power of the State, and the reasons therefor are immaterial, but it is to be remembered that we are only considering the single question of power to exclude or revoke—for that is all the power we concede the State has over a foreign corporation, to-wit, a simple statute in such terms as this:
>
> "'The Security Mutual is hereby prohibited from entering Kentucky; or the license of the Security Mutual is hereby revoked.'" (Page 48 of counsel's brief.)

In view of counsel's concession that when the mere naked revocation of a license is involved, the terms given by the State for the revocation are "immaterial"—and this is, of course, well settled law—we amend counsel's suggested act, thus:

> "The license of the Security Mutual is hereby revoked for the reason that the company has removed an action against it to a Federal court."

Our contention is, that the State has in substance done this very act. The State through its legislative department has prescribed and defined the duties of one of its chief officers. The duty involved is the revocation of a license on the happening of a certain event—that certain event is one which the State confessedly could by a valid "affirmative expression" have used as a reason or basis for expelling all foreign corporations from its borders. The act of the officer in performing this duty under the direction of the statute is the act of the State itself, made effective and operative after the cause arises which the State thought sufficient for the revocation. The legislative act—though dependent on a future event for its development and execution, is the law from the moment of its adoption. Its execution and operation is made to depend on contingencies, as many laws are. Therefore, the revocation by Prewitt on September 29, 1904, of the license here involved, for reasons which the State had the right to announce, is a valid "affirmative expression" expelling the company from the State, and is in effect a mere naked exclusion or revocation, and the statute is in as "simple" a form as the one formulated by learned counsel, as being a valid one.

The contention, of course, is that the State must wait until each recurring act has been done by a foreign company, which in the judgment of the law-makers would justify an expulsion, and that it can not devolve in advance the duty on its officers of doing what it would do, and confessedly had the right to do, under the same circumstances. And this theory counsel evolve out of the doctrine that *parties can not in advance agree to oust courts of their jurisdiction.* As no agreement of any kind on the part of anybody, at any time or place, is involved, we are not able to appreciate the force of the argument. The argument comes to this, that the State can expel for removal to the Federal courts if it does not get the reason *in advance.*

We can not see why a State may not put the causes or reasons which will induce a revocation by its officer, and therefore by itself, on its records—its statute books—as well before the fact which will result in the revocation as after the fact so resulting. In neither case can the reasons for the State's action be material, nor can these reasons be inquired into. And as we have seen, it is really in substance an action by the State operating effectively for the first time as to any particular act of removal, and subsequently to the act of removal, although the State is acting through its officer, who is likewise acting after the act of removal.

While the legislature can not delegate its power to enact laws to its officers, yet it may provide that whether or not a law enacted by it shall be operative shall depend, say on the popular will; and why may not the State on the same principle devolve the duty of putting the law into force—that is, of declaring a license forfeited—for any

reason which the legislature shall deem proper to put in statutory form, and which reasons for such enactment the legislature itself confessedly and without question could give, if acting directly on the subject after the act of removal?

In connection with this conceded right of the State to revoke the license of the foreign company by the action of its law-makers after each recurring act of removal for any reason it might see fit to give, or without any reason, it may be worth while to note that the stress put on the alleged fact that the statutory provision making it the duty of the Commissioner to revoke a license when the company removes its case, inflicts a penalty on the company, loses its entire force. For surely the affirmative or direct exercise by the State of the right of revocation after the company's removal of its case, without statutory warning to it, would be no more a penalty and no more harmful to it than where the State gives the warning to the company, in the statute, that if it removed its case, it must also move its business. The company at least is then put on its guard, and may come into the State and do business in the courts as the State provides, or it may keep out and avoid the penalty.

The State fixes in advance that the company is to renew annually its license. When renewed by the Commissioner, it is the State renewing it, not the Commissioner. It might just as well say that after renewing for five years for any company, the Commissioner should thereafter refuse to renew longer, and it might give no reason for this; or it might give as a reason that one company by that time had probably incurred as much obligation to the public as was safe, or any other reason—good

or bad—the Commissioner does as directed—it is the State doing it. So the State revokes the license in the case at bar, and its reasons or grounds for so doing are as *immaterial as if the State*, after the removal, had by its legislative department enacted the law suggested by counsel.

If, therefore, the test of the constitutionality of the law under consideration be that it visits the penalty of forfeiture of right on the company for doing what is its constitutional right to do, a point much pressed in the argument of counsel, then that test must render unconstitutional and void the act of the legislature in affirmatively expressing its will to revoke after each recurring act of the offending company. But as it is admitted the test is unsound in the one case, so it must be admitted to be unsound in the other. The fact is, that the vital and *missing* feature in either case, is that in neither event is there a *requirement* that the foreign company shall surrender any right guaranteed to it under the Constitution or the Federal statutes. Inconvenience and annoyance may result in not exercising the right to remove, or in the moving from the State if the case be removed; but neither inconvenience nor annoyance has ever been held in any court anywhere to overcome the will of the sovereign State. If so, then a showing that inconvenience and annoyance in being kept out or that even large pecuniary profit would come to such companies as were desiring to enter the State, but which they are not allowed to do for some supposed captious and arbitrary law of the State, would be sufficient excuse to override the will of the State and force their admission upon an unwilling public. The test is admittedly on all hands repugnant to the Consti-

tution, not annoyance and inconvenience to a corporation whose sole right in the State depends on the State's consent.

Repugnancy does exist whenever the State requires the company to agree in advance not to remove,—such an agreement is void, and is so treated in all the cases. In the present law there is no repugnancy because there is no agreement—no stipulation—for a surrender of any right.

The surrender of constitutional right which will create a repugnancy between the alleged offending law and the Constitution, of which the books speak, is an enforced surrender of such right by an agreement or stipulation made in advance, as a condition precedent to admission to a State. And no case anywhere has gone further than this. An enactment by the legislature of Kentucky, reciting that:

> "Whereas the Security Mutual Ins. Co. has, in violation of the warning given all such companies, removed a case to the Federal courts when sued by a citizen in the courts of this State, therefore, and for this sole reason, the license of said company to longer do business in this State is hereby revoked,"

Would admittedly be valid, and yet it is every whit as repugnant to the Constitution as the present law is claimed to be. It would inflict the same alleged penalty, and impose the same burden on the right to remove its case. It would be repugnant to the Constitution and laws of Congress in precisely the same sense as the present law is alleged to be repugnant. In neither case, however, would the State or its laws have deprived the company of any right to remove, which is the only Federal right it

had; but in each case the company would be deprived of the *right to do business longer in Kentucky*, a right which the wildest imagination has never set up as a *Federal right*. What right, therefore, is it which is guaranteed to the complaining company under Federal law, of which it is deprived? Certainly not the right to remand its case, for it has already remanded it. Not the right to stay in Kentucky, because no such *right* is guaranteed under Federal law.

III.

In discussing the first general proposition submitted in argument by the plaintiff in error, namely, that it would be a valid exercise of its power if the State would, after each recurring removal of their cases by foreign companies, enact a law revoking their respective licenses, we have already entrenched largely on the second point made by learned counsel, namely, that Kentucky Statutes, Sec. 631, providing for a revocation of licenses in the event a foreign insurance company removes a case to the Federal court, is repugnant to the Federal Constitution, because, "it imposes a burden on a right guaranteed thereunder, and makes the continuance within the State dependent upon the surrender or abandonment of, or abstention from, the right of removal to the Federal courts."

We have attempted to show that the law set forth in Section 631, making it the duty of the Commissioner to revoke the license, as in this case, was as much the act of the State, made effective after the removal, as was the admittedly valid act of the State in the supposed enactment suggested by counsel, and therefore that the section

was valid on the very ground maintained and admitted by counsel; and that neither the section under consideration nor the proposed enactment deprived the insurance company of any constitutional right. Without repeating the argument, because the entire range of the subject can more fully be treated under a discussion of the authorities to be noted presently, it is to be observed that the most that can be said against this section is, not that it deprives the company of any right, but that it probably "deters removals to the Federal court." So that the question in its last analysis comes to this:

Is it contrary to the Constitution and the laws of the United States that one who is entitled thereunder to remove a case to the Federal courts is left free to do so, but in the event he does remove, he must forfeit a privilege held at the will of the State? It seems to us to ask this question is to answer it.

It is argued that as Congress has the exclusive right to repudiate the removal of causes, the conditions of removal can not be added to by the State, or additional burdens imposed. An illustration of this, say counsel, would be the imposition by the State of a fine of $10.00 on every removal to the Federal court. We think the answer to this suggestion lies in this:

The permit is the State's stamp of approval on the company, and it is one thing to demand a surrender of this permit because of the company's business methods, or other reasons, and quite another thing to impose a fine on the company for doing what it has the constitutional right to do. The one is within, the other without, the power of the State.

Moreover, the State is as sovereign, or is as absolute in its right to *expel the company* by revoking a license granted to it by the State, without its reasons for such expulsion being inquired into, as Congress is in its right to regulate removals. It is a case of two sovereigns providing each in its own way for matters *within their respective powers*, and incidental results do not affect the exercise of these powers.

The State, acting within its conceded power, may expel the foreign company—no, say counsel, not if it gives as a reason for its acting, the fact of removal by the company; very well, says the State, "I will simply expel, and you can not question my reason for so doing."

Congress has no power to control the State, as to the revocation of licenses granted to it to foreign companies, and it would be a limitation on the State's power of revocation if, when about to exercise it, Congress should call on the State for its reason. It is trifling with the question to say that the State may expel without giving a reason, and yet if it happens to give one, the power can not be exercised. The bottom of the matter is, that you can not look into the reason at all for the State's action. If the State may expel without a reason, is its power to expel destroyed, if it gives a bad reason? The *reason* the State happens to give in this case is not the *burden* of which complaint is made, it is the *expulsion* itself which is the burden, and which causes the company's loss of continued business in the State. The whole complaint is of the *revocation*, and the thing that *hurts* is the *revocation*.

Therefore the inconvenience to the company, its loss of prospective business, and its burden of moving from the State, are caused by, and are attributable solely to, the

act of expulsion, and the "why" of it is not a matter of inquiry.

IV.

Hastening on to the point of considering the authorities, we yet desire to note briefly that it is a well-settled principle that in the absence of a valid State law preventing the foreign company's admission to the State, or of a valid license law required before doing business, the company may as freely enter and do business as if it were an individual.

This principle is aptly asserted by opposing counsel (pages 11 and 12 of their Brief) thus:

> 2." Until a State has decided otherwise by some valid affirmative direct enactment to the contrary, a foreign corporation has the right, by virtue of the common law rule of 'Comity' to enter any State and transact its business." (Citing 13 Am. & Eng. Ency. Law, 838-839; Cowell vs. Springs Co., 100 U. S. 555-59; Christian Union vs. Yount, 101 U. S. 352-356.)

It is to be noted that the law requiring the license must be a valid law,—it must not, of course, contravene any right guaranteed to the applicant for the permit under the Constitution and laws of the United States. Thus the proposed license law must not require the applicant to agree or stipulate that he will not remove a cause to the Federal courts. Such a requirement is not only obnoxious to the Federal law giving him a right to remove his cause, but is as void as an attempt to oust courts of their jurisdiction. If such an agreement or stipulation is exacted by a State law, a foreign company may make the stipulation, yet move its cause to a Federal court, and will be

treated necessarily in its conduct of its business after such removal precisely as if no law had been enacted by the State requiring a license. This is the necessary consequence of the principle announced.

However, the applicant may ignore the law requiring the vicious agreement, go into the State in spite of it, and he can not be prosecuted for doing business without a license, simply because there is no valid law—therefore no law—preventing his admission to the State or requiring a license. These principles are harmoniously established by the three cases chiefly in point on this appeal, namely:

Home Insurance Co. vs. Morse, 20 Wall. 445;
Doyle vs. Continental Ins. Co., 94 U. S. 535;
Barron vs. Burnside, 121 U. S. 186.

THE AUTHORITIES.

On the general proposition that the admission into a State and the continued conduct therein of the business of a foreign corporation (save of certain ones not involved here) depend solely on the consent of the State, the citation of authority is hardly necessary. The principle is frankly conceded by opposing counsel, as we understand their argument.

The question herein is set at rest by the cases of

Paul vs. Virginia, 8 Wall. 168;
Horn Silver Mining Co. vs. New York, 143 U. S. 305;
Hooper vs. California, 155 U. S. 650, and many others.

In the latter case it is said:

> "The principle that the right of a foreign corporation to engage in business within a State, other than that of its creation, depends solely upon the will of such other State, has long been settled, and many phases of its application have been illustrated by this court."

(Citing Citizens Bank of Augusta vs. Earle, 38 U. S. 519, and a score of other cases) and the court continuing said:

> "Whilst there are exceptions to the rule, they embrace only cases when a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of the busines."

An extract from Blake vs. McClung, 172 U. S. 255, is cited in counsel's brief (page 58) as tending to show some modification of this doctrine; but which we think shows the contrary. There, a mining corporation in Tennessee became insolvent and its assets under a statute of the State were directed to be distributed among its creditors, but priority was to be given to the Tennessee creditors. Certain creditors in Ohio and a certain corporation of Virginia presented their claims and were postponed by the State courts to the Tennessee creditors.

This court reversed as to the individual non-resident creditors, on the ground that the Tennessee statute deprived the Ohio creditors of the "privileges and immunities" guaranteed to them under Section 2, Art. 4, of the Federal Constitution, but held that the Virginia corporation was not a citizen within the meaning of that clause of the Constitution, and was not therefore protected by it; and moreover that the statutory denial to it of equality with the Tennessee creditors was not in violation of the

provisions of the Fourteenth Amendment, securing persons the equal protection of the laws. And the debt of the corporation was postponed to those of the individual creditors, resident and non-resident. We can find no consolation for counsel in this case.

THE CHIEF CASES IN POINT.

Home Ins. Co. vs. Morse, 20 Wall. 445.

This case, involving a Wisconsin statute, was decided in 1874, Mr. Justice Hunt delivering the opinion for the court. Under the terms of the statute it was made unlawful for a foreign fire insurance company to do business in that State, unless it should first file with the Secretary of State a power of attorney containing an agreement under the seal of the company to the effect that the company would not remove a cause to the Federal courts. The power of attorney so filed in the case involved contained the clause:

> "And said company (meaning the Home Ins. Company) agrees that suits commenced in the State courts of Wisconsin shall not be removed by the act of said company into the United States Circuit or Federal courts."

In certain actions against the company in the State court, the courts of Wisconsin held that the statute and the agreement under it justified a denial of the petition to remove the cause to the United States court.

On appeal to the Supreme Court of the United States, the court held that the agreement was an effort to oust or divest the ordinary tribunals of justice of their jurisdiction; and moreover that the agreement gained nothing from the statute, because that provision of the statute re-

quiring such an agreement was in conflict with the Constitution and laws of the United States which conferred on a citizen under certain conditions the right to go to a Federal court with his case.

The only feature of the Wisconsin law which was involved was the clause requiring the agreement not to remove, and the statute in this particular was held to be unconstitutional and void.

The court concluded as follows:

> "1. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court upon compliance with the terms of the act of 1789.
>
> "2. The statute of Wisconsin is an obstruction to this right: is repugnant to the Constitution of the United States, the laws in pursuance thereof, and is illegal and void.
>
> "3. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

The question involved the *right of removal* which had been denied by the State court of Wisconsin, and the opinion, of course, must be read in the light of that fact. The question of the power of the State to revoke a permit issued under a valid law or otherwise did not arise.

(2) Doyle vs. Continental Insurance Co., 94 U. S. 535.

This opinion was also delivered by Mr. Justice Hunt, and was decided some two years later than the Home-Morse case. After the decision of the latter case, and because of it, the Continental Insurance Company, a New York corporation doing business in Wisconsin, when sued

in one of the State courts, moved the case to a Federal court, and when Doyle, Secretary of State, on whom the duty involved under the Wisconsin statute of revoking the license of a foreign insurance company if it so removed a case, was threatening to revoke the license for the *sole reason that the company had removed* a case to the Federal court, the company brought its suit to enjoin him from so doing.

The trial court granted the relief and enjoined the secretary from revoking the license. The judgment was reversed by the Supreme Court.

It was urged on appeal to the Supreme Court that the Morse case was decisive of the question, in that it held the statute of Wisconsin to be unconstitutional and void and that those statutes of Wisconsin which denounced penalties for exercising the right of doing business in the State, and which right was sought to be restrained by the statute, were all void, etc.

The purpose of this argument was to show that under the Morse opinion the statute, meaning the *entire* statute, on the subject of requiring licenses, etc., and the agreement under it not to remove being void, neither could be used as the basis or pretext for revoking the license.

The court met this by holding that it was not decided in the Morse case that any part of the Wisconsin statute was unconstitutional except that clause which required the agreement not to remove.

The court said:

> "The opinion of the court must always be read in connection with the facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the Constitu-

> tion of the United States and is illegal and void, must be understood as spoken of the provision of the statute under review; that portion thereof requiring a stipulation not to transfer cases to the courts of the United States. The decision was upon that portion of the statute only and other portions thereof, when they are presented, must be judged of upon their merits. We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State."

The court shows then that the State did have such power by citing Paul vs. Va., 8 Wall. 168 (19, 357); Ducat vs. Chicago, 10 Wall. 410; Insurance Co. vs. French, 18 How. 404; and the court said:

> "Neither did the case of Ins. Co. vs. Morse, *supra*, undertake to decide what are the powers of the State of Wisconsin in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts or was argued by counsel or referred to in the opinion of the court. The case here before us does present that point and with distinctness."

The principle was then announced, as having been established by certain cases already referred to, "that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper that are not repugnant to the Constitution and laws of the United States."

Of course the condition that "no removal should be had to a Federal court" was not one of the conditions here meant by the court as imposable by the State, for the court had just said this could not be done. The court

referred to other terms and conditions in the Wisconsin law which a foreign company had to comply with in order to get admission to the State.

The Wisconsin statute contains a number of conditions prescribed by that law before admission could be granted. The corporation should have $100,000 in paid-up capital to be disclosed by a personal examination of the Commissioner.

The company must file its charter with certain affidavits as to its condition, locality, agent on whom process could be served, etc., and if after the examination the affairs of the company were found "to meet the conditions and requirements of law, the Commissioner shall issue such certificate of admission."

These were evidently the conditions and requirements of the Wisconsin statute, which the court was holding to be valid, or at least was assuming to be valid, because not questioned, and of which it had been theretofore said in the opinion, "their validity was not involved."

So we have a case where there were valid conditions imposed by the State which the companies were to perform before getting a license, and this license, because based and required on unobjectionable terms, was deemed to be a valid license and was not supposed to be tainted with the vice of the license required in the Iowa statute involved in the Barron-Burnside case, to be considered presently.

Now, of such a license as the court was considering in the Doyle case; that is of such a one as the State had a right to issue, because based on valid enforcible conditions, the court, continuing, said:

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revokable."

Rector vs. Philadelphia, 24 How. 300.
People vs. Roper, 35 N. Y.; People vs. Comes, 47 N. Y. 501.

The court enforced what it had already said by forceful, and, we think, unanswerable reasoning. And whilst holding that the clause as to removal was repugnant to the Federal Constitution, when imposed as a condition for the license, yet the court held that a State having granted a license, could withdraw it at pleasure, and its reason for doing so, although that reason was the removal of a case to the Feedral court, "was not the subject of judicial inquiry."

"If the State has the power to do an act," said the court, in speaking of its act of withdrawing the license, "its intention, the reason by which it is influenced in doing, can not be inquired into."

This case has certainly never been overruled; and on the contrary it has been referred to as authority, though not in special point on the question involved here, in the cases of:

Fire Association, etc., vs. New York, 119 U. S. 110;
United States vs. Des Moines, etc., 142 U. S. 546;
Pope, etc., vs. Gormelly, 142 U. S. 238;
New Orleans vs. Warner, 175 U. S. 147;
Cable vs. U. S. Life Ins. Co., 191 U. S. 288.

And in the only case where it is supposed to have been shaken in any respect, the conclusion—which is all we ask here—is left wholly unassailed.

We believe that both the reasoning and the conclusions of this opinion are sound, although some portions of its pronouncements were said "not to have been in judgment" in a later case. In connection with that case we will further notice the supposed fault, but it is certain that the question whether injunction would lie to prevent the officer from revoking the license was "in judgment," and this conclusion and determination was in effect approved in the succeeding case and has never been questioned in any case since.

Barron vs. Burnside, 121 U. S. 186.

This is the chief case relied on by opposing counsel.

The Iowa statute, not separable in its parts, the court said, required the application for a permit to be *accompanied by a stipulation* that the permit should be subject to each of the provisions of the act, and one of the provisions was that the permit was to be forfeited if the corporation removed a case to the Federal court.

The permit was thus based on a stipulation of the company made in advance not to remove. An agent of a foreign corporation ignored the law requiring him to apply for a permit based or conditioned on such a stipulation, and *without a permit proceeded to do business.*

One of the sections of the act made this a misdemeanor. The agent was arrested, and although he "urged that the statute of Iowa was void as an attempt to interfere with the jurisdiction of the Feedral courts, as established by the Constitution of the United States and the acts of Congress," the Iowa court "upheld the validity of the statute."

The Supreme Court said that such a statute, requiring such a stipulation, was unconstitutional and void, and the agent was not guilty. The decision is simply to the effect that the State of Iowa did not have a *valid license law.*

And this, because the parts of it which might have been upheld as valid and lawful were so interwoven with the unconstitutional requirement of a void stipulation as to make the whole bad. The court said, "an affirmative provision requiring the filing by a foreign corporation with the Secretary of the State of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone, but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the *stipulation referred to,*" (removal stipulation), "shows that the real and only object of the statute and its substantial provision is the requirement of the stipulation not to remove the suit into a Federal court. In view of these considerations, "continued the court," the case falls directly within the decision of this court in Home Insurance Co. vs. Morse, 87 U. S., 20 Wall. 455 (22, 365.)"

The court then concludes the opinion on this branch of the case thus: "As the Iowa statute makes the *right* to a permit dependent upon the surrender by a foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The thing adjudged in the case is that the State can not prevent the removal, and it can not require a stipulation in advance not to remove, and if such a stipulation

is required in the *application for a license,* no separable provision of an unobjectional character being found in the statute—it renders the whole statute providing for permits unconstitutional and void. That there being therefore no valid statute providing for the issuing or granting of permits to do business in the State, before any is done, the agent who does such business is not guilty of a misdemeanor by reason of doing business without a license. With this conclusion we certainly have no fault to find.

It follows inevitably, we think, from the reasoning of the learned judge delivering the opinion for the court, that had there been an Iowa statute imposing unobjectional requirements only as condition for the permit or imposing unobjectional requirements, together with objectionable ones, but not so "coupled" as to be inseparable, so that on the whole there would have been a valid statute requiring a permit before doing business, then we submit the agent would have been held guilty of a misdemeanor in transacting business without such a permit.

Manifestly the decision does not affect or control the law of a case where a license has been applied for and obtained under a valid law so requiring such a license, or point out the duties or powers of the State or its officers in withdrawing for good or bad reasons the license granted under such valid law.

The validity of the Kentucky Statutes requiring the obtaining of a license on the part of foreign insurance companies before doing business in this State is conceded in the pleadings of the companies and has often been upheld in this court without question.

The companies in fact file their licenses and assert their validity as a ground why they should not be re-

voked. In Franklin Ins. Co. vs. L. & A. Packet Co., 9 Bush, the validity of our license law was pushed to the extent of denying the company the right to recover for insurance premiums in this State without having obtained its license.

When a permit or license is thus required by a valid statute and is obtained by a company, the principles of law under and by which that license may be withdrawn by the State are altogether different from the principles invokable to invalidate a permit *forced* on a protesting company by an illegal and unconstitutional requirement.

The State need not, and possibly some of the States do not, require the companies to obtain a license. When they do require it, the exaction of any stipulation contrary to the Federal law as a *condition precedent* to obtaining the license, puts the matter precisely in the same attitude as if no license had been required.

The license not being required by a valid law, there remains no law in force for punishing the company for doing business without the license—hence the decision discharging the agent in the Barron-Burnside case.

THE KENTUCKY LICENSE LAW.

Section 634 of the statute is as follows:

> "Every insurance company not organized under the laws of this State, before transacting any business in this State, if it has not already done so, shall return to the Commissioner a copy of its charter, articles of association, or deed of settlement, by whatever name its organic law may be called, and the Commissioner, upon being satisfied that such company has fully complied with the laws of

> this State, and is possessed of the legal reserve, shall furnish to such agents as the company directs a license to transact business as agent for said company under the seal of the Insurance Department."

If, in order to "fully comply with the laws of the State" within the meaning of this section, it should be found that a company must have agreed in advance not to remove its suits to a Federal court, then our statutes would be as obnoxious as that particular feature of the Wisconsin statute was declared to be in Home Insurance Co. vs. Morse, 20 Wall. 445 (22; 367), or if our statutes anywhere require a stipulation in the application for a license to the effect that no removal to a Federal court would be taken, then the section quoted and the license required under it would be as invalid as the Iowa statute was held to be in the Barron-Burnside case. No such vice is herein found in our statutes. A foreign insurance company desiring to do business in Kentucky must first return to the Commissioner a copy of its charter, articles of association or deed of settlement. (Section 634.)

It must also file with the Commissioner a resolution consenting that service of process upon any agency of the company in this State, or upon the Commissioner of Insurance of this State, in any action brought in this State, shall be a valid service. (Section 631.)

This section, as heretofore shown, is the one providing for revocation if removal is made, but there is nowhere any provision for an agreement or stipulation on the part of the company not to remove.

If the company is already doing business, its license must be renewed annually in the same manner as when the original license was obtained. (Section 633.)

In addition to filing copies of its articles of incorporation or association or foreign insurance companies must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, etc. (Section 657.)

Under the head of "Insurance other than Life," (Section 694) provision is made for the issual and renewal of licenses upon compliance by such companies with the provisions of the law applicable thereto, and in Section 761 the rate of fees for issuing such licenses are fixed. In none of these provisions is any stipulation or agreement required not to remove, and the only provision found on that subject is in Section 631, which is not intended to affect the right to the license, or to be a condition on which the right thereto is based, but merely a provision that on the happening of a removal, the duty of the Commissioner will be to revoke the license. The provision is intended to regulate the action of the Commissioner with respect to the conduct of the company *after* and not *before* it has obtained its license.

So our laws on this subject are not tainted with an unconstitutional condition precedent to the obtaining of the license.

It may be that the court in the Doyle-Continental case might or should have taken the position that the whole of the Wisconsin statute requiring a license for foreign companies was void, and that there was therefore no valid law so requiring. Hence perhaps the basis for the criticism in Barron-Burnside case.

But the court in the Doyle case started with the assumption that there was a valid license issued on terms and conditions that were unobjectionable, and on this

assumption the reasoning of the court is, it seems to us, unassailable.

Given, a valid license issued by a State, with the conceded right to withdraw it at any time, and we maintain that to destroy that right for any reason, good or bad, is to destroy altogether the long-established doctrine that a foreign corporation may do business in another State only with the consent of that State.

We do not believe, when properly construed, that there is any real conflict in these three opinions.

In the Morse case the sole question was, was the statute requiring an agreement not to remove, valid and enforcible?

It was a question of a valid agreement, or not a valid one.

In the Doyle case it was a question of the State's power to revoke with or without a reason, and in disregard of whether it was a good reason or a bad reason.

In the Barron-Burnside case it was a question of the existence in the State of a valid and enforcible license law or an invalid and non-enforcible one.

The course of reasoning in each is not exactly alike, although practically so, and there is no conflict in the conclusions reached on the points involved.

The Doyle case at last was the only one involving the question of the power of the State to revoke a license, which is the *sole question we are now concerned with.*

The opinion of the Court of Appeals in this case, delivered for the court by Judge Hobson, cogently presents the main features of the case thus:

"Our statute is not liable to the objections made to the statutes either in the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State for the protection of its citizens against unsafe insurance companies should require them before doing business in the State to obtain a license from the Insurance Commissioner, and to furnish him such evidence of their solvency as will protect insurers in this State, before he is authorized to grant them a license. The license which the State grants is purely a matter of grace. and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it, he takes it subject to revocation. He can not question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State with or without reason. If I have a license to cross my neighbor's lot, and he revokes it because I brought a suit against his son, I can not enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for revoking the license he had given me; for he had an absolute right to revoke the license, and the fact that he did it out of spite or for a bad reason is immaterial. The State, by her statutes above referred to, in effect, says to the foreign insurance companies, 'I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come, you refuse to so stand, I will withdraw my license.' The reason for the statute is not distrust of the Federal courts, but the practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the party and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the

vicinage; the State simply says to the foreign insurance companies, 'I will withdraw my license if you insist on privileges not enjoyed by home companies.' If the State on the day before these suits were filed, by legislative act had withdrawn all license to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States Circuit Court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by special statute? Certainly they can not complain that the license of certain other companies was not revoked.

* * * * * * * * * *

"The naked question presented here is, may the State, without cause, revoke a license it has once granted? for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound, unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in the State (Hooper vs. California, 155 U. S. 650), and yet it may not at will withdraw a license which it has once granted to such corporations.

"It seems to us that the Doyle case rests on sound principles, and that the Barron case in no wise conflicts with it: for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the Morse case. (6 Thompson on Corporations, Sections 7466-67; 13 Am. & Eng. Ency. of Law, page 867; People vs. Pavey, 151 Ill. 101.)"

(4.) Commonwealth vs. East Tennessee Coal Co., 97 Ky. 238.

Here was a coal company of Tennessee selling coal in Whitley County, Kentucky. Upon being sued it exercised its conceded right to take the case to a Federal court.

Thereupon the Commonwealth brought an *equitable action* in which the provision of Section 572 of the statutes of the State was sought to be specifically enforced; which provision is that "if any foreign corporation shall without the consent of the adverse party, remove to a Federal court any action pending against it in any court of this State, * * such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State." A transaction of any business after such removal is made a misdemeanor for which a penalty is provided.

The relief asked in the State's action was that the company be compelled to quit doing business in Kentucky.

The question involved was whether the State or its courts could specifically enforce the provision of the statute forfeiting the right of the company to do business in Kentucky on the ground that it had removed a case to the Federal court.

The State's power to revoke a license granted by it to do business was not involved, because no such license was granted by the State or needed by the company.

The power of the State to sue a foreign corporation and compel it to quit business when it had confessedly violated no valid law is one thing, and the power of the State to withdraw a license granted by it to the corporation is quite another thing. It is simply a question of power and the manner of exercising it.

If a coal company or other trading company move a case to the Federal courts and still transacts business in Kentucky it violates no valid law.

If a foreign insurance company's license be withdrawn by the licensor and the company still attempts to

transact business in the State, it is guilty of doing business without a license. It violates a valid license law imposed by the State.

The case, as well as the kindred one for a fine of Commonwealth vs. Jellico Coal Co., 97 Ky. 246, falls within the principles stated in Barron vs. Burnside and in the Morse case, and the question decided in the Doyle case was in no wise presented.

What is said in the opinion of the Court of Appeals refers to the case of Commonwealth vs. Jellico Coal Co., 97 Ky. 246, and the judge who wrote the opinion becoming suddenly sick, had no opportunity to correct the reference. The section involved in both these cases was the same, viz., Section 572, and affected the matter of "doing business in the State," but no license was required.

No question of the right of complainants to do business in the State is involved here; the simple question is, shall the State be enjoined from revoking a license it has granted? The license from the State sets upon the insurance company the mantle of its approval. It enables the company to say to the people, "I comply with your laws, I have the license of the State; the State thus says to you, I am safe and trustworthy, and you may have no doubt about this." The livery of the State with which the company is thus clothed is a valuable thing, for many persons will trust the company thus endorsed who would not otherwise trust it. This endorsement the sovereign State may withdraw, and the company can not by injunction require the State to continue the endorsement and thus enable it to mislead those with whom it proposes to do

business. The Court of Appeals had this in mind, as shown by the closing words of the opinion, as quoted above.

We respectfully ask an affirmance.

J. H. HAZELRIGG.

N. B. HAYS, *Attorney-General,*
H. R. PREWITT,
HAZELRIGG & HAZELRIGG,
Of Counsel.

POINTS AND AUTHORITIES.

Right of foreign insurance company to do business in State depends solely on consent of State.

Paul vs. Virginia, 8 Wall. 168;
Horn Silver Mining Co. vs. New York, 143 U. S. 305;
Hooper vs. California, 155 U. S. 650;
Blake vs. McClung, 172 U. S. 255; and other cases.

Section 631, Ky. Statutes, is a valid exercise of power to expel a foreign company, and the reasons therefor are immaterial.

Doyle vs. Continental Ins. Co., 94 U. S. 535;
13 A. & E. Ency. Law (2d Ed.), 867;
6 Thompson on Corporations, Sections 7466-7467;
People vs. Pavey, 151 Ill. 101.

And this doctrine is not inconsistent with:

Home Ins. Co. vs. Morse, 20 Wall. 445;
Barron vs. Burnside, 121 U. S. 186;
Com. vs. E. T. Coal Co., 97 Ky. 238;
Com. vs. Jellico Coal Co., 97 Ky. 246.

No agreement or stipulation being required of the company under the statute, it is not repugnant to the Constitution and laws of the United States.

Sec. 631, Kentucky Stat., and cases above.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

THE SECURITY MUTUAL LIFE INSURANCE CO.,

vs. NO. 178.

H. R. PREWITT, INSURANCE COMMISSIONER
AND
TRAVELER'S INSURANCE COMPANY,

vs. NO. 184.

SAME.

REPLY TO PETITIONS FOR RE-HEARING.

If permitted, we desire to submit in reply to the petitions, that if, as sought to be now shown, the licenses of the plaintiffs in error, have in fact been renewed since the litigation began under the Statute requiring them to be renewed annually, we can not see how on this account the question involved becomes any less abstract or academic than it was found to be by this Court for the reason that the licenses had expired.

In no event can any relief be granted if the judgments should be reversed. The Courts surely can not be asked to re-instate licenses, which, as is now made to appear, have already been re-instated or renewed.

Again we wholly disagree with Counsel when they argue that a life insurance company can do business in this State

under our Statutes without the actual and literal granting and issual of a license, or permit or certificate authorizing the doing of such business.

(See Sections 631, 633, 634 and 642.)

Nor do we assent to their suggestion that we did not argue the point on which the cases were decided by this Court because we recognized that the question involved was a broader one than the mere life of a particular license or permit.

We omitted to call attention to the fact solely through inadvertence — growing out of the fact that our brief was prepared originally for the Kentucky Court of Appeals, when the question was confessedly a live one, and few changes were made in it for this Honorable Court. In fact, if our attention was ever called to the fact of the renewals, it had escaped us when we submitted our argument.

But in any event omissions of Counsel or even agreements of Counsel will not induce the Court to decide *dead issues*. Indeed any intentional attempt of Counsel to have the Court do so would be in contempt of the Court.

We are not seeking to avoid a decision of these cases on their merits, but can not ask the Court to consider an issue which the lapse of time has already settled under our Statute.

Respectfully submitted,

J. H. HAZELRIGG.

For Defendant in Error.

Supreme Court of the United States.

Nos. 178 and 184.—October Term, 1905.

Security Mutual Life Insurance Company, Plaintiff in Error, 178 *vs.* Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	In error to the Court of Appeals of the State of Kentucky.
The Travelers Insurance Company of Hartford, Connecticut, Plaintiff in Error, 184 *vs.* Henry R. Prewitt, Insurance Commissioner of the State of Kentucky.	

[May 14, 1906.]

Mr. Justice Day (with whom concurs Mr. Justice Harlan) dissenting.

In view of the importance and far-reaching effect of the decision just announced, and being unable to concur therein, we have deemed it not improper to briefly state the grounds upon which our objection to the decision of the court rests.

Certain principles of constitutional law are firmly settled by the decisions of this court and need no citation of cases in their support. The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, (20 Wall. 445,) has never been questioned, and is affirmed in frequent decisions of this court. No State regulation in hostility to this principle can be recognized without endangering the supremacy of the National Constitution.

The Kentucky statute imposes but a single condition necessary to be now considered upon the right of foreign corporations to do business in that State. It says in effect to a company not yet licensed to transact business within its borders, there is no objection to the company transacting business

in this State; on the other hand, it is desirable that it shall do so, subject to the condition that the company cease to do business in the State and its license be revoked the moment it attempts to avail itself of its constitutional right to remove a controversy into the Federal court under the terms of the Federal statute passed to make the constitutional right effectual. From that time its further right to do business shall cease and determine and its license be revoked. To companies lawfully within the State, as are the appellants in these cases, it makes the like proposition: You may carry on your business, having complied with other conditions, but the moment you undertake to exercise the constitutional right of removal to a Federal court your license shall be revoked, and all authority to do business in the State shall cease. That this can be constitutionally done is affirmed in the decision of the court in these cases, because of the principle that the State, having the right to exclude foreign corporations from its borders, may do so for any reason, although such action, as in the present case, is based solely upon the denial of the right of removal in proper cases by a non-resident citizen, of cases coming within the act of Congress, to the Federal courts.

As a general proposition it is undoubtedly true that a State may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit. But this right in our opinion is not without limitation. It is the established doctrine of this court that a restriction of this power is found in the denial of the right to a State to impose a condition in direct conflict with the Constitution of the United States, in requiring a corporation, as a sole condition of doing business within the State, to surrender the right of removal created and enforced by the Federal Constitution and laws in advance, or give it up after its admission to do business in the State.

The question came directly before this court in the case of *Insurance Company* v. *Morse*, (20 Wall. 445,) in which it was held that a State might not require a foreign corporation, as a condition of doing business within its borders, to file an agreement that such company would not remove the suit for trial into a United States Circuit Court or other Federal court. The act was held to be repugnant to the Constitution of the United States and the laws passed in pursuance thereof, as it denied the right of removal secured to the citizens of another State by the Constitution and laws of the United States. The question arose again in the case of *Doyle* v. *Continental Insurance Co.*, (94 U. S. 535.) In that case it was held by the majority of the court, Mr. Justice Bradley, Mr. Justice Miller and Mr. Justice Swayne dissenting, that the State of Wisconsin might lawfully enact a statute providing that if any foreign insurance company should transfer a suit brought in the State to a Federal court its license to do business would

be cancelled and revoked, and the doctrine was laid down that as a State had the right to exclude the company for any reason, the means by which it should cause such exclusion or the motives of her action were not the subjects of judicial inquiry. Thus the decisions of this court stood until the case of *Barron* v. *Burnside*, (121 U. S. 186,) was brought to its attention, in which it was held that a statute of Iowa, requiring a foreign corporation, as a condition of doing business in the State, to stipulate that it would not remove cases into the Federal court, which it had the right under the laws of the United States to remove, was void. And the case of *Home Insurance Co.* v. *Morse, supra*, was approved, and *Doyle* v. *Continental Insurance Co., supra*, qualified and explained. In this case Mr. Justice Blatchford delivered the unanimous opinion of the court. It is apparent from its perusal that the principle stated in *Insurance Co.* v. *Morse* and in the dissenting opinion in the Doyle case was recognized and affirmed, and the unqualified right of exclusion denied. After showing that the right to remove was the creation of the Federal Constitution and laws and could not be impaired without deprivation of a Federal right, the ground of the decision was stated to be:

"As the Iowa statute makes the right to a permit depend upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

And further, in speaking of the Doyle case:

"The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment."

And that the court did not regard the right of a corporation in that respect as differing from that of an individual is shown in the observation:

"Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove suits."

In concluding the decision the court said:

"In all the cases in which this court has considered the subject of the granting by a State to a foreign corporation of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States. (*La Fayette Ins. Co.* v. *French*, 18 How. 404, 407; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Insurance Co.* v. *Morse*, 20 Wall. 445 456; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Phila. Fire Ass'n* v. *New York*, 119 U. S. 110, 120.)"

It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the State to exclude foreign corporations, its right to do business within the State could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of *Barron* v. *Burnside* is in our judgment decisive of the contention made in the present case. If it be true, as specifically declared in that case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the State of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business with the State; if it will not, its license will be revoked and its right to do local business destroyed. In short, it may continue to do business within the State, if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the State to exclude foreign corporations from its midst, and, to sustain the statute, permits a State, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the States would nullify the supreme law of the land in some of its most essential provisions.

An examination of the decisions subsequent to *Barron* v. *Burnside*, *supra*, is convincing to the effect that it has been accepted by the courts, National and State, as decisive of the proposition therein announced, that a State statute giving the right to do business or to terminate a business already instituted, upon the sole condition of the surrender of a Federal right, secured by the Consitution, is void and of no effect. The case, thus interpreted, has been cited and followed in subsequent cases in this and other Federal courts.

In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 207,) Mr. Justice Gray, delivering the unanimous judgment of this court and referring to a statute of Texas similar to the one now under consideration, said: "That statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege

secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions," citing *Insurance Company* v. *Morse* and *Barron* v. *Burnside*. The same eminent judge, delivering again the unanimous judgment of this court in *Martin* v. *Baltimore & Ohio Railroad*, (151 U. S. 673, 684,) and again citing the *Morse* and *Barron* cases, said: "The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right, under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States, and could not have been deprived of that right by any provision in the statutes of the State." Again, upon the authority of the same cases, including the Denton case, this court, by its unanimous judgment in *Barrow Steamship Co.* v. *Kane*, (100 U. S. 100, 111,) said: "So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." To the same effect was the case of *Blake* v. *McClung*, (172 U. S. 239, 255–6,) in which it was said, upon the authority of the *Morse*, *Barron* and *Denton* cases: "It was accordingly adjudged in *Barron* v. *Burnside*, (121 U. S. 186, 200,) that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that State, to stipulate that it would not remove into the Federal courts suits that were removable from the State courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. . . . So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void." In *Chattanooga, R. & C. R. Co.* v. *Evans*, (66 Fed. Rep. 809, 814,) heard before Judges Taft, Lurton and Severens, the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton and referring to the Morse and Barron cases, recognized the right of the State to prescribe terms upon which a corporation of another State or country may carry on business within its borders, but taking care at the same time to say: "That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such nonresident corporation shall not resort to the courts of the United States."

In *Bigelow* v. *Nickerson*, (70 Fed. Rep. *supra*,) Judge Jenkins, speaking for the Circuit Court of Appeals, Seventh Circuit, after reviewing the cases in this court, said:

"We consider the question foreclosed and no longer open to discussion. No condition imposed upon a right granted by a State, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States can be upheld."

In *Reimers* v. *Seatco Man. Co.*, (70 Fed. Rep. *supra*,) Judge Taft, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. In *Insurance Co.* v. *French*, (18 How. 404,) Mr. Justice Curtis, speaking for the Supreme Court, said:

"'A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. (*Bank* v. *Earle*, 13 Pet. 519.) This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.'

"In *Southern Pacific Co.* v. *Denton*, (146 U. S. 202, 13 Sup. Ct. 44,) it was held that the law which permitted a non-resident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the State, was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States; citing *Insurance Co.* v. *Morse*, (20 Wall. 445,) and *Barron* v. *Burnside*, (121 U. S. 186, 7 Sup. Ct. 931.)"

Notwithstanding these cases, it is now adjudged that so far as the Constitution of the United States is concerned, it is competent for any State to withdraw or cancel a license given to a corporation of another State to do business within its limits whenever and solely because that corporation, being sued in a State court, has the case removed to the Federal court for trial or hearing. If each State should enact a statute, such as the one before us, the right secured to a corporation when sued in the courts of a State other than the one creating it, to invoke the jurisdiction of the Federal court, would be abrogated throughout the whole United States, although such right is secured by the Constitution and by valid acts of Congress. We cannot assent to this view. It amounts to a practical nullification in respect to such corporations of the supreme law of the land and places important constitutional rights at the mercy of the several States.

In the State from which this case comes, after a full review of the decisions of this court, the same conclusion was reached in *Commonwealth* v. *East Tenn. Coal Co.*, (97 Ky. 238.)

The same view of the effect of *Barron* v. *Burnside* has been accepted by the text writers. (2 Cook on Corporations, 3d ed. 1675; Moon, Removal of Causes, [1901,] §§ 30 and 31, and notes in which the author expresses the view that the Doyle case has become obsolete and is practically overruled by *Barron* v. *Burnside* and subsequent cases in this court, § 30, note 3; Curtis' Jurisdiction of the United States Courts, 2d ed. by Merwin, 187.)

The principles announced in *Doyle* v. *Ins, Co.* and *Barron* v. *Burnside* are directly opposed the one to the other, and cannot both prevail. The former case was decided upon the principle that as the State has the full right to exclude a foreign corporation it may do so for any reason or for no reason. The latter case qualified this doctrine with the limitation that the exclusion may not be solely because the corporation was exercising or would not yield the right to avail itself of a privilege created and protected by the Federal Constitution.

After such repeated affirmance and general acceptance, we do not think the doctrine announced in *Barron* v. *Burnside* ought to be qualified or detracted from, and certainly it seems to us that the court should not return to the rejected doctrine of the Doyle case.

If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the Doyle case, destroyed and overthrown as we think in *Barron* v. *Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and arti-

ficial, that they have been secured by the provisions of the Federal Constitution.

In the opinion of the court in this case the doctrine that a corporation cannot be permitted to be deprived of its right to do business because of the assertion of a Federal right is said not to be denied, because the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal Constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and, as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution. Furthermore, it is stated in the prevailing opinion that while the State may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the State, because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional.

We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the State because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a State to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution, which secures to alien citizens the right to resort to the courts of the United States.

In the cases decided in this court subsequently to *Barron* v. *Burnside*, while the general proposition is affirmed that a State may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the State may exclude or expel such corporations because they insist upon the exercise of a right created by the Federal Constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the Federal Constitu-

tion. The Federal authority gives no right to deny to the citizens of a State access to the local courts of a State. For wise purposes the Federal Constitution has provided courts for citizens of different States, believed to be free from local influence and prejudice, and laws have been passed by Congress to make the privilege of resort to them effectual. In our view no State enactment can lawfully abridge this right or destroy it, directly or indirectly by affixing heavy pealties to its assertion by those lawfully entitled to its enjoyment. We think *Barron* v. *Burnside* was intended to overrule the contrary declaration which is found only in the Doyle case, which is inconsistent with or opposed to every other declaration directly upon the subject in the opinions of this court.

We are of opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a State court removed to the Federal court for trial, is unconstitutional and void.

For the reasons stated we are constrained to dissent.

True copy.

Test:

Clerk Supreme Court, U. S.